Equal Accountability Through Tort Law

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Jason M. Solomon*

INTRODUCTION.................................................................................................................. 1766

I. TORTS AS INDIVIDUAL JUSTICE: THE SEARCH FOR A MORAL NORM AND POLITICAL JUSTIFICATION .......................................................... 1771
A. The State of Tort Theory: A Thumbnail Sketch ....................................................... 1771
B. Corrective Justice’s Justification Challenge ......................................................... 1773
C. Enter Civil Recourse Theory .................................................................................. 1775
D. Recourse Theory’s Need for Normative Justification ........................................... 1779

II. THE MORAL FOUNDATIONS OF RECOUSE THEORY ........................................ 1784
A. Entitled to Feel Resentment ..................................................................................... 1785
B. The Normative Appeal of Acting Against One Who Has Wronged You .... 1790

III. JUSTIFYING A STATE-SPOONED FORUM FOR ACTING AGAINST WRONGDOERS .................................................................................. 1798
A. Understanding the Precise Role of the State ......................................................... 1798
B. A State-Sponsored System of Equal Accountability ............................................. 1805

IV. POSSIBLE OBJECTIONS............................................................................................ 1812
A. A Defense of Vengeance? ....................................................................................... 1812
B. Why Not Just Demand Apology or Confront? ..................................................... 1814
C. General Lack of Fit with Contemporary Tort Law and Practice ....................... 1815
D. Settlement & Insurance ......................................................................................... 1818

CONCLUSION................................................................................................................. 1819

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INTRODUCTION

In August 2005, Carol Ernst, whose husband had died a few years earlier after taking the drug Vioxx, confronted Merck, the company that made the drug, in a Texas courtroom. Through her attorney, Mark Lanier, she accused the company of rushing the drug to market without properly ensuring it was safe and failing to warn consumers of its risks. This wrongful behavior, she argued, killed her husband. The jury agreed.

Carol Ernst’s trial, the first involving the Vioxx drug, got nearly as much attention in the pages of the Wall Street Journal as the Enron trial had a few years before. For the pharmaceutical industry, and the business community more broadly, the Vioxx litigation was a bellwether for the state of the civil justice system. If Mrs. Ernst and other plaintiffs won, Merck’s stock would continue to take a beating. The company might even go under.

All because under state tort law, individuals like Mrs. Ernst could go before a jury—a group of lay people with no expertise in science, medicine, or the pharmaceutical industry—and second-guess the sales and marketing of a drug that the federal Food and Drug Administration (FDA) had approved as safe and adequately labeled. The jury could then decide on a multimillion dollar award for a plaintiff on the ground that the company should have done something differently.


3 The original jury verdict of $253 million was reduced by the judge to $26 million in accordance with a recently passed Texas “tort reform” provision. See Ernst v. Merck & Co., Inc., No. 19961*BH02, 2006 WL 4661007 (Tex. Dist. June 23, 2006) (ordering that Ernst recover from Merck the sum of $26.1 million); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 2008) (“Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1) (A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000.”). The verdict was eventually overturned a few years later on appeal, on the ground of insufficient evidence of causation. See Merck & Co., Inc. v. Ernst, --- S.W.3d ---, 2009 WL 1677857 (Tex. App. June 4, 2009).

I offer this case as an example of the kind of case that is at stake in preemption and tort reform debates because the particular case was a high profile one, and the kind of case—challenging the side effects of a drug—is particularly relevant to preemption. My use of it is not meant as an endorsement of its clearly excessive verdict.

4 See Joyce B. Margarce & Michelle R. Scheiffele, Is the Preemption Defense for PMA-Approved Medical Devices in Jeopardy?, 75 DEF. COUNS. J. 12, 23 (2008). In recent litigation, a medical device company, Medtronic, Inc., argued, as could pharmaceutical companies like Merck, that “allowing plaintiffs’ claims to proceed to juries to impose their own ad hoc requirements contrary to those set up by the FDA would ‘guarantee chaos in the controlling standards, unprincipled second guessing of FDA regulatory enforcement decisions, and a flood of scientifically dubious warnings.’” Id.
And the first Vioxx trial might have been just the beginning. The next
day, in the next courtroom—or one in Arkansas, or Oklahoma, or New Jer-
sy—the whole process could, and did, start again. Different juries could
make different decisions about whether Merck behaved wrongly, and
about the extent to which it should be punished if it did.5 For critics of the
civil justice system, this was a perfect example of a system out of control.
If people expected companies like Merck to invest in research and de-
velopment, this process of allowing jury second-guessing through tort law had
to end.6

So while Merck aggressively litigated these cases, the business com-
munity pursued a long-term strategy as well. Working closely with the
Bush Administration, industries got administrative agencies like the FDA
and the National Highway and Traffic Safety Administration, which regu-
lates auto safety, to insert “preemption” provisions into their regulations.7
These provisions were designed to tell courts that the federal regulation in
that area ought to prevent individuals from bringing state-law claims. The
aim of these preemption provisions was to keep plaintiffs like Mrs. Ernst
out of court.

The preemption strategy of the Bush Administration and the business
community has since received much attention both in the media8 and among
legal scholars. Scholars have criticized a more expansive approach to
preemption, arguing that it gives insufficient attention to states’ rights9 and

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5 Indeed, this happened. See Nora Lockwood Tooher, Verdicts & Settlements January 16, 2006:
Texas Jury Awards $253 Million in First Vioxx Trial, LAWYERS WEEKLY USA, Jan. 16, 2006, available
at 2006 WLNR 23714535 (“Since the Aug. 19 verdict [in the Ernst case] Merck has evened the score by
winning a defense verdict in the second Vioxx trial, and a third trial ended in a hung jury, with all but
one of the 12 jurors supporting [Merck] …. The stakes in the first wave of trials are enormous, with
more than 9,000 Vioxx cases pending in state and federal courts.”).

6 See Richard Epstein, Rule of Law: Ambush in Angleton, POINT OF LAW, Aug. 22, 2005,
http://www.pointoflaw.com/columns/archives/001482.php (arguing that the implicit verdict in the orig-
inal Ernst case, and subsequent cases, was to “shut down the entire quest for new medical therapies”).

7 See, e.g., 18 FEDERAL PROCEDURE, LAWYER’S EDITION § 43:83 (2008) (summarizing the National
Highway and Traffic Safety Administration’s preemption provision, which bars certain common law tort
actions for failure to meet minimum standards set forth by the Administration).

8 See, e.g., Thomas Ginsberg, Litigation Inoculation, PHILA. INQUIRER, July 9, 2006, at E1, availa-
ble at 2006 WLNR 11813379 (discussing “the Bush [A]dmistration’s efforts to rein in claims against
pharmaceutical companies”); Myron Levin & Alan C. Miller, Industries Get Quiet Protection from
[A]dmistration is providing industries with an unprecedented degree of protection at the expense of an
individual’s right to sue and a state’s right to regulate.”); With Help from Kessler, Waxman Mounts As-
sault on FDA Preemption, FDA Wk., May 16, 2008, available at 2008 WLNR 9277647 (discussing
Congressman Waxman’s questions about “why FDA has so aggressively stepped up its preemption argu-
ments under the Bush [A]dmistration”).

9 See, e.g., Nina A. Mendelson, A Presumption Against Agency Preemption, 102 Nw. U. L. REV.
695, 699 (2008) (“The institutional focus of agencies makes them particularly ill-suited to consider state
autonomy to regulate or federalism concerns.”); Thomas W. Merrill, Preemption and Institutional
consider the federalism implications of their actions, agencies have generally sought to avoid such an
that it is an unprincipled grouping together of federal choices to set a regulatory “floor” with what is effectively a “ceiling.”

They also make the claim that the need for this kind of ex post regulation demonstrates the limited ability of the FDA and other agencies to ensure optimum levels of safety.

Meanwhile, the Supreme Court has taken several preemption cases in the last decade, including most recently Wyeth v. Levine, a case that left the door open for plaintiffs like Mrs. Ernst to continue to complain about drug companies’ failure to warn about possible harm that could result from using their products. And the Democratic Congress, led by Representative Henry Waxman, is considering bills that would roll back some of the Supreme Court’s more restrictive preemption jurisprudence.

Both sides in this debate, though, share a common but unexamined assumption: that the purpose of state tort law is to act as a regulatory device. Just as the FDA decides when a drug is ready for market and what warnings ought to accompany it, state tort law supplements that regulatory function by putting a price on the harm the drug inflicts. The threat of lawsuits forces the drug company to internalize the costs of potential harm and

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10 See William W. Buzbee, Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction, 82 N.Y.U. L. Rev. 1547 (2007) (arguing that the choice between setting a regulatory floor as opposed to a ceiling has very different institutional implications).

11 See Samuel Issacharoff, Regulating After the Fact, 56 Depaul L. Rev. 375, 380–84 (2007) (articulating the importance of “ex post accountability” in the U.S. regulatory regime); Carl Tobias, FDA Regulatory Compliance Reconsidered, 93 Cornell L. Rev. 1003, 1009 (2008) (“Limited resources and authority may prevent the FDA from being an effective arbiter of optimal, rather than minimal, safety . . . . For example, the FDA may approve a new drug before it receives thorough experimental data proving the drug is safe and efficacious because the agency depends substantially on manufacturer information and is pressured to certify pharmaceuticals quickly.”); see also Peter Barton Hutt, The State of Science at the Food and Drug Administration, 60 Admin. L. Rev. 431, 432 (2008) (describing the FDA as “an agency with expanded responsibilities, stagnant resources, and the consequent inability to implement or enforce its statutory mandates”).


15 The implicit tension in Supreme Court opinions between those who assume that this is the case, as opposed to those who believe that tort law serves a function related to compensation or justice, is observed in Catherine M. Sharkey, Products Liability Preemption: An Institutional Approach, 76 Geo. Wash. L. Rev. 449, 459–71 (2008). See also Richard Nagareda, FDA Preemption: When Tort Law Meets the Administrative State, 1 J. Tort L. 1, 2 n.8 (2006) (citing Sharkey, supra).

make a more accurate assessment about whether the drug’s benefits sufficiently outweigh its costs. Anticipating litigation, the drug company might conduct more clinical trials beforehand or provide more robust warnings than the FDA alone requires.

But what if this is not the purpose or function of state tort law? Certainly, one effect of state tort law may be to encourage caution in the design, manufacturing, and marketing of potentially hazardous products, but is that really the purpose or function of state tort law? Its raison d’être? As Richard Nagareda has put it in the context of medical devices, “one might say that it is the dominant scholarly account of tort law itself as an arm of regulation . . . that has spawned the conflicting federal and state commands that support preemption here.”

If we are going to preempt—that is, eliminate—state tort law in a variety of circumstances, then we ought to have an answer to these questions: What exactly are we preempting? What does it do? Why is it there?

Indeed, the same existential question that is now critical to the preemption concerns before all three branches of government in Washington ought to be at the core of the tort-reform debates in the state capitals. But the question is rarely asked.

We are perhaps now at the tail end of a wave of changes to tort law, commonly grouped under the banner of “tort reform,” enacted by the legislatures and the judiciary. These changes, occurring primarily in the last decade, followed periods of reform during the 1980s and early 1990s. Indeed, the damages cap which reduced Mrs. Ernst’s verdict was a product of such a tort-reform effort in Texas. No doubt as this wave recedes, another will crest in the not too distant future. Others have ably looked at the pre-


17 See Nagareda, supra note 15, at 15. See also id. at 37 (noting that the dominant scholarly account of tort law “emphasizes the capacity of tort litigation to serve as an occasion for regulatory policy making by judges and juries” (citing John C.P. Goldberg, Twentieth-Century Tort Theory, 91 GEO. L.J. 513, 521–37 (2003))).

cise nature and effects of these periods of tort reform, though more empirical research remains to be done.

But despite these efforts on the state and federal level, spanning a range of substantive and procedural aspects of tort law, we have proceeded with no answer to the question, as one scholar has put it, “what are we reforming?” This Article asks that same question, in slightly narrower terms: What is tort law for? My aim in this Article is to turn to legal theory for help with these real-world dilemmas.

The strategy of the Article is as follows: after briefly surveying the landscape of contemporary tort theory, I focus in Part I on the traditional conception of tort law as individual justice that has been revived in recent years. After reviewing the problems that have been raised with the most prominent of these individual-justice accounts, “corrective justice” theories, I turn to a promising challenger in the individual-justice camp: “civil recourse” theory, which sees tort law as a means for empowering individuals to seek redress against those who have wronged them.

Civil recourse theory has an advantage over corrective justice in its fit with the structure, concepts, and doctrine of American tort law. But it seems to lack a morally appealing norm at its core. Indeed, critics such as John Finnis have charged that it seems to smack of vengeance, and treats such an impulse as morally worthy. Though the civil recourse theorists—John Goldberg and Benjamin Zipursky—have pointed to reasons justifying a law of civil recourse, they have thus far stopped short of providing a robust normative justification for such a social institution.

This Article seeks to provide such a justification. It does so by breaking down the normative case for civil recourse into three parts: first, why a victim of an accidental harm is entitled to resent the tortfeasor such that

20 Such research is beyond the scope of this paper.
21 John C.P. Goldberg, What Are We Reforming? Tort Theory’s Place in Debates over Malpractice Reform, 59 VAND. L. REV. 1075 (2006) [hereinafter Goldberg, What Are We Reforming?].
22 This is not the first, and will no doubt not be the last, article on the topic. Indeed, I do not try to invent a new theory here, but attempt to make a modest contribution to existing theories and debates and take as a virtue that this Article builds on the work of others.
23 See infra text accompanying notes 80–81.
24 This may well be in part a result of their interpretive methodology. They have explained that they see the first step in analyzing tort law as understanding it from the “inside,” as judges who must decide cases do; therefore, for them, following the perspective of a common law judge, “the question of whether there is an adequate normative justification for tort law has not been front and center.” John C.P. Goldberg & Benjamin C. Zipursky, Accidents of the Great Society, 64 MD. L. REV. 364, 364–65 n.2 (2005) [hereinafter Goldberg & Zipursky, Accidents].
second, she is morally justified in “acting against” that tortfeasor in some fashion, and third, is given access to a state-sponsored mechanism (tort law) for doing so.

These first two steps are the moral norms at the heart of civil recourse theory and are addressed in Part II. Relying in part on recent work in moral philosophy, particularly by Stephen Darwall, I explicate the appeal of these norms. Then in Part III, I consider how the third step—justifying the precise role of the state—can be understood by translating Darwall’s moral norm into a political or social ideal of equality. Part IV addresses some objections to this account, and then I conclude.

Though my focus is on civil recourse theory, I think this discussion can illuminate the normative appeal of a broader set of individual-justice theories of tort law. In this way, I aim to provide an initial response to those who would eliminate tort law through preemption or significantly curtail it through “reform” efforts. In response to the practical and theoretical question of what tort law is for, I answer that it provides a vehicle for individuals to bring about justice, and in doing so, vindicates the notion of a community of equals who are answerable to one another and expected to treat one another with equal respect.

Whether or not such an institution is worth having, in light of its costs and effect on other social goals, is for Congress, state legislatures, and citizens to decide. But that is what is at stake.

I. TORTS AS INDIVIDUAL JUSTICE: THE SEARCH FOR A MORAL NORM AND POLITICAL JUSTIFICATION

What is tort law for? In this Part, I first give a very brief sketch of the state of tort theory. Then I focus on the search for a morally appealing norm and the political justification for an institution of “corrective justice,” the leading individual-justice theory, as well as the theory of civil recourse. I look at the reasons that the recourse theorists have put forward thus far for having a law of civil recourse, but conclude that they need to go further in their normative justification, a task I begin to undertake in Parts II and III.

A. The State of Tort Theory: A Thumbnail Sketch

Today, tort scholars tend to give one of three accounts of the purpose of tort law: (1) individual justice; (2) compensation for accidental injuries; or (3) it serves a variety of public policy goals at once, including economic efficiency, deterrence of risky activity, injury compensation, spreading the loss associated with injuries, and even social justice.25 The second answer—compensation for accidental injuries—faces serious challenges because tort law does not always succeed in achieving that goal, leaving many

25 For a more thorough account of the different tort theories, see generally John C.P. Goldberg, Twentieth Century Tort Theory, 91 GEO. L.J. 513 (2003).
seriously injured individuals without compensation commensurate to the harm suffered. The failure to adequately achieve adequate compensation, along with the lack of historical evidence indicating that this was tort law’s intended purpose, seriously undercuts the plausibility of compensation as an explanatory theory of what tort law is for.

The third explanation—what John Goldberg has called “congenial pluralism”—suffers from a number of problems.\(^\text{26}\) As with compensation, no historical evidence demonstrates that these public policy goals motivated the development and design of tort law. More problematic, public policy goals like deterrence and loss spreading often conflict—how should one decide which goals take precedence over the others in a particular case or area of doctrine? The congenial pluralists’ answer—that one tries to balance all the goals in any given case—does not provide much comfort.

The individual-justice approach was the most disfavored of these for most of the twentieth century.\(^\text{27}\) Most scholars saw the idea of torts-as-individual-justice as a relic of history, rooted in its origin as a replacement for private vengeance.\(^\text{28}\) Historically, of course, the “individual justice” explanation has the strongest pedigree, and in the last few decades, this explanation has made a comeback in tort theory through the work of George Fletcher and Richard Epstein in the early 1970s, and more recently, Jules Coleman, Ernest Weinrib, and others.\(^\text{29}\) At the same time, economic efficiency as a descriptive account of tort law—advanced by Richard Posner in the early 1970s—has largely fallen by the wayside, abandoned even by the most ardent proponents of law and economics, who focus on the normative

\(^{26}\) Id. at 579–80.

\(^{27}\) As George Fletcher put it, “The fashionable questions of the time are instrumentalist: What social value does the rule of liability further in this case? Does it advance a desirable goal, such as compensation, deterrence, risk-distribution, or minimization of accident costs?” George P. Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537, 538 (1972) (footnote omitted).

\(^{28}\) See, e.g., CHARLES FRIED & DAVID ROSENBERG, MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT, 26–27 (2003) (explaining that they find it “incomprehensible” that the tort system would “assert a moral mission of doing ‘individual justice,’” thereby increasing the cost of accidents).

\(^{29}\) See generally JULIE L. COLEMAN, RISKS AND WRONGS (1992) (explaining tort law as concerned with identifying whether there are instances of “wrongful loss” where a wrongdoer ought to compensate the victim for the harm caused); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) (describing corrective justice as a self-contained practice where those who behave wrongfully discharge their duty of repair by compensating those they have harmed); Richard A. Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151 (1973) (outlining a libertarian theory of tort law where the act of causing harm to another, even with without fault, is ground for compensation); Fletcher, supra note 27 (explaining both negligence and strict liability as expressions of a single reciprocity principle). Other leading corrective justice theorists include Arthur Ripstein and Stephen Perry. See, e.g., ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY AND THE LAW (1999); Stephen R. Perry, The Moral Foundations of Tort Law, 77 IOWA L. REV. 449 (1992).
aspect of using economic efficiency as the primary dimension of value for evaluating how tort law should be. 

No single theory dominates the field. Most scholars think corrective justice—the leading individual-justice theory—is more consistent than other accounts with the “internal point of view”—that of lawyers and judges—but that it is too abstract and indeterminate to help make doctrinal choices or decide cases. And so many scholars fall back to some kind of pluralist notion of tort law serving the goals of compensation, deterrence, and other public policy aims, with others disputing the need or desirability for a theory at all. However, without a theory of what this area of law is supposed to accomplish, it is difficult to have a meaningful discussion about how well it is functioning and how it might do better—the kind of discussion that is critical in today’s preemption and tort-reform debates.

B. Corrective Justice’s Justification Challenge

Corrective justice, a theory which focuses on wrongful conduct or loss, seeks to restore the equilibrium that has been violated by a person who has wrongfully harmed another. By injuring another wrongfully, the injurer acquires a “duty of repair,” which is fulfilled through tort law. The very “bipolar” structure of tort law—litigation is between a private plaintiff and defendant—helps illustrate what is normatively important about tort law, the relationship between these private parties, as opposed to a public purpose like regulating risky activity. And the most common remedy in tort—the payment of money damages, equivalent to the magnitude of the

30 See, e.g., Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 HARV. L. REV. 961, 1044–45 (2001) (“Initially, we note that most authors who advance notions of corrective justice are making positive—that is, descriptive—arguments; in particular, they suggest that corrective justice is the principle that is most consistent with common law tort doctrine. To this extent, their claims about corrective justice have no direct relevance to our undertaking because our thesis is entirely normative, being concerned with the proper manner of assessing legal policy. (Indeed, we do not assert that the law fully reflects the prescriptions of welfare economics, and we argue . . . that the law is influenced by notions of fairness, perhaps including corrective justice.).”)

31 Even some corrective justice theorists appear to agree with this. See, e.g., Ernest J. Weinrib, Correlation, Personality, and the Emerging Consensus on Corrective Justice, 2 THEORETICAL INQUIRIES L. 107, 158 (2001) (“[F]or all its theoretical sophistication, the exploration of corrective justice by tort theorists has involved a comparatively narrow set of legal doctrines.”).

32 To be fair, some scholars seem to think that a pluralist notion of an area of the law is better than a “monistic” one. See, e.g., Jane Stapleton, Evaluating Goldberg and Zipursky’s Civil Recourse Theory, 75 FORDHAM L. REV. 1529, 1560 (2006) (“We can see what is distinctive about a tree, but we cannot reduce this to a unitary notion. Indeed, why would we want to do so?”).

33 The idea of an equilibrium restored by corrective justice comes from ARISTOTLE, NICOMACHEAN ETHICS, BOOK 5.5, 74–76 (T. Irwin trans., 1999).

victim’s injury—serves to restore the equilibrium disturbed by the wrong or injury.\footnote{See Ernest J. Weinrib, The Idea of Private Law 135–36 (1995) (“[T]he defendant’s liability to the plaintiff rectifies both the normative gain and the normative loss in a single bipolar operation.”).}

While corrective justice theory is intuitively appealing, its proponents have struggled to identify a normative justification for having such an institution. For example, although Jules Coleman, a leading corrective justice theorist, has powerfully developed the legal norm of corrective justice over the last three decades, he has failed to identify a norm rooted in moral theory which the legal norm aims to vindicate.\footnote{Indeed, Coleman does not think that identifying such a norm is his burden under the methodological approach he favors. See Coleman, The Practice of Principle, supra note 34, at 4–5 n.4 (distinguishing his approach from that of Ronald Dworkin, who would look to a moral norm or principle); see also id. at 5 (“The defensibility of corrective justice as a moral ideal is . . . independent of its role in explaining tort law.”).}

One possibility is that corrective justice vindicates the moral principle: “Don’t take what is not yours.”\footnote{See Arthur Ripstein, Tort Law in a Liberal State, 1 J. TORT L. ISS. 2, ART. 3, at 11 (2007), available at http://www.bepress.com/jtl/vol1/iss2/art3 (“You can use your means, but not mine . . . .”).} Another possibility is that corrective justice serves to determine and enforce the just distribution of risk in society.\footnote{See Tony Honore, The Morality of Tort Law—Questions and Answers, in Philosophical Foundations of Tort Law 83–84 (David Owen ed. 1997); Ripstein, supra note 29, at 48–93 (describing tort law as a way of determining “a fair division of risks”).}

Still another possibility is that the legal norm of corrective justice is a “second-best” solution of how to discharge the moral duty of reasonable care when it has already been breached. In other words, if you violate your duty of care with respect to another and harm him, the duty does not go away. You can no longer try to avoid causing him harm because you have already done so, but you can, as a second-best solution, pay him compensatory damages in order to discharge that duty.\footnote{See Arthur Ripstein, As If It Had Never Happened, 48 WM. & MARY L. REV. 1957, 1972, 1984–86 (2007) (discussing how “money reverses the deprivation” of one’s means).}

Central to this justificatory challenge has been determining how corrective justice relates to distributive justice.\footnote{There is a significant body of literature on the moral norm underwriting corrective justice and the relationship between corrective justice and distributive justice; I do not intend to contribute to this body nor thoroughly canvass it here. My aim is simply to show that the moral norm is on shaky foundations—that besides the other criticisms, one aspect that has prevented corrective justice theory from getting more traction is the lack of a compelling justification for such a system.} Specifically, the challenge goes something like this: if the initial entitlements which individuals hold are themselves distributively unjust—because of the accident of birth, for example—why would we have a system of “justice” to return to said entitlements?\footnote{This point has been made by many who criticize corrective justice, including Hanoch Dagan, The Distributive Foundation of Corrective Justice, 98 Mich. L. Rev. 138 (1999).} Reinforcing distributively unjust positions seems an odd task.
for the state to undertake. If a waitress making $25,000 a year drives too fast because she is late for work and rear-ends Donald Trump, why should the state have a mechanism for Trump to coerce the waitress into paying him damages?

One strategy is to argue that the moral norm behind corrective justice is to protect a distributively just set of entitlements. If the distributive justice criteria are satisfied, then the moral norm of corrective justice comes into play as a principle of political morality that has been translated into the legal realm through tort law. Coleman suggests that this principle of political morality depends on “what is required to secure an underlying distribution of holdings,” including what is necessary for individuals to “pursue lives of their own choosing.”

But in a world where underlying distributive justice is hard to find, the legal norm and practice of corrective justice may be difficult to justify.

C. Enter Civil Recourse Theory

In the last fifteen years, Benjamin Zipursky and John Goldberg have developed an alternative theory of tort law as individual justice. Their theory identifies the central feature of tort law as the state’s provision of a right to recourse to those who have been the victims of a legal wrong. Drawing on Blackstone and Locke, they find support in history and political

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42 Jules Coleman uses this strategy in Political Morality and Tort Law (unpublished and undated manuscript), available at http://www.law.yale.edu/yclp/papers.html. To be sure, Coleman refers to his thoughts in this unpublished manuscript as “very preliminary and tentative as I am by no means certain of the views expressed or of the arguments offered in their support.” Id. at 1.

43 Id. at 9.

theory for the notion of an individual’s right to redress a wrong against him or her.\textsuperscript{45} In a series of articles, they demonstrate how this principle of “civil recourse” can explain a variety of doctrines within torts better than economic or corrective justice accounts.\textsuperscript{46}

In many ways, their work builds on the corrective justice theories of Jules Coleman and particularly Ernest Weinrib, and these theorists’ critiques of economic accounts of tort. But Zipursky and Goldberg have several critiques of corrective justice theory that helped form the basis for civil recourse theory.\textsuperscript{47}

First, they argue that the theory of corrective justice inaccurately indicates that there is a “duty of repair.” Rather, they say, there is no affirmative duty to pay anything in the absence of a lawsuit. If the lawsuit is successful, there is a liability, not an affirmative duty.\textsuperscript{48} Second, corrective justice theory does not account for countless tort cases where wrongs by defendants do not lead to liability. These cases, Zipursky argues, are explained by a series of “substantive standing” requirements that specify when certain classes of victims can successfully sue particular defendants.\textsuperscript{49} Finally, recourse theory criticizes corrective justice for treating compensatory “make-whole” damages as the only and essential remedy in torts, thus conflating the issues of tort liability and remedy. Rather, there are a variety of remedies awarded in tort, including injunctions and punitive damages.\textsuperscript{50}

A key innovation of Goldberg and Zipursky is their explanation of how an individual’s right to recourse is more consistent with the structure of tort law than corrective justice or economic accounts. Under our system of tort law, individual victims decide whether or not to bring lawsuits against their injurers.\textsuperscript{51} If tort law was really about compensation for injuries, deterrence of risky activity, or correcting a disequilibrium created by harm to another, then it is not clear why the state should not undertake these tasks, just as it prosecutes crimes.\textsuperscript{52} However, Goldberg and Zipursky believe that the ab-

\textsuperscript{45} See, e.g., Goldberg, Constitutional Status of Tort Law, supra note 44, at 532–58; Zipursky, Philosophy of Private Law, supra note 44, at 637–42.

\textsuperscript{46} See Zipursky, Civil Recourse, supra note 44, at 697–98 (arguing that his “model of rights, wrongs, and recourse . . . aims to provide a superior account of the structure of tort law to that offered by both law and economics and corrective justice theory”).

\textsuperscript{47} The piece that most specifically targets corrective justice theory is id. at 709–33.

\textsuperscript{48} Id. at 718–21.

\textsuperscript{49} Id. at 714–18.

\textsuperscript{50} See id. at 710–13. For a summary of these critiques, see Jason M. Solomon, Judging Plaintiffs, 60 VAND. L. REV. 1749, 1785–86 (2007).

\textsuperscript{51} Zipursky, Civil Recourse, supra note 44, at 754 (“[C]orrective justice theory itself misses the true structure of tort law. Tort law is a system in which individuals are empowered to bring rights of actions against those who have committed torts—legal wrongs—against them.”).

\textsuperscript{52} Goldberg, What Are We Reforming?, supra note 21, at 1076 (“To posit that tort law is a system for deterring undesirable conduct and compensating injury victims is, essentially, to think of tort law as a branch of the administrative state.”).
sence of a Department of Accidental Harm\textsuperscript{53} in our legal system indicates that perhaps there is some reason other than administrative convenience or historical accident for privately initiated lawsuits that can help illuminate tort law’s normative structure.\textsuperscript{54} This reason, they conclude, is that the principal aim of tort law is to provide individuals with the right to redress wrongs, not the correction of harms or deterrence of risky activity.\textsuperscript{55}

One response to civil recourse theory has been to shrug it off as simply a dressed-up version of corrective justice. The historian John Witt says that some literature now “purports to offer a different basis for tort in what is styled civil redress,” but he claims it is “effectively the same” as corrective justice.\textsuperscript{56} From a slightly different perspective, fellow individual justice theorist Alan Calnan scolds Goldberg and Zipursky as “corrective justice ‘insiders’” who have turned on their theoretical friends.\textsuperscript{57} Indeed, Goldberg and Zipursky have acknowledged their sympathy for and intellectual debt to the corrective justice accounts, and Goldberg includes both recourse theory and corrective justice in the family of “individual justice” theories in tort.\textsuperscript{58} But the theories are different in important ways.

Corrective justice theory takes as the fundamental feature of tort law the payment of money damages from the defendant to the plaintiff if liability is established.\textsuperscript{59} This monetary transfer serves to restore the equilibrium that has been upset by the harm that the wrongdoer has inflicted upon the person harmed.\textsuperscript{60} As one leading corrective justice theorist puts it, the payment of money damages is intended to give back the resources that the injurer has taken from the victim so that the victim can use those resources towards her own ends, as we can each do in a liberal society.\textsuperscript{61}

For recourse theory, though, it is the entitlement to the claim itself—the “avenue of recourse”—that is the “animating idea” behind tort law.\textsuperscript{62} Goldberg puts it this way: “The core claim of redress theory is that tort law’s distinctiveness resides in conferring on individuals (and entities) a
power to pursue a legal claim alleging that she (or it) has suffered an injury flowing from a legal wrong to her by another.”

To use H.L.A. Hart’s distinction, it is the “power-conferring” rather than the “duty-imposing” aspect of tort law that defines it and bestows its distinctive character.

In part, this is a dispute about the methodology of legal theory—specifically, what are the salient features of an area of law that must be explained. For all corrective justice theorists, the bipolar structure of tort law—that the injured brings a lawsuit against the injurer—is itself an instantiation of this principle of corrective justice, tying together the “doer” and the “sufferer,” to use Aristotle’s terms. But for some corrective justice theorists, particularly Jules Coleman, the particular institutional mechanisms used in tort law—where private lawsuits are brought by victims at their discretion—is historically and culturally contingent. In other words, for Coleman and others, a proper descriptive theory of tort law need not explain the structure of the institution of tort law itself.

Coleman makes his view of the contingency of privately initiated lawsuits quite clear in a recent paper, responding to the recourse theorists’ critique by explaining that society might respond to “corrective injustice” by investing in a legal system that can identify such injustices. Such a system might be structured logically through privately initiated lawsuits on the theory that the victim has the greatest incentive to develop the evidence to help identify such injustices (and enforce the duty to repair). This system would also have the benefit of acknowledging a “special claim” on behalf of the victims. But in explaining this, Coleman makes clear that our particular system is not essential to vindicating the normative principles that tort law is designed to achieve.

Though the corrective justice theorists claim to take the structure of tort law seriously, the focus on the payment of damages as the mode of restoring normative equilibrium leads to serious questions about whether the system of privately initiated lawsuits has any place in corrective justice theory at all. Is there any reason why the state could not act as an Aristotelian schoolteacher, shaking her finger at the defendant, demanding that the defendant return the toys that he had improperly taken from the plaintiff? From a corrective justice theory perspective, the answer appears to be no.

63 Goldberg, Constitutional Status of Tort Law, supra note 44, at 605.
64 H.L.A. HART, THE CONCEPT OF LAW 26–33 (2d ed. 1997) (introducing the distinction between these two kinds of rules).
65 See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 3–22 (1980).
66 Weinrib, supra note 29, at 65.
67 Ripstein expresses this view as well, though Weinrib would disagree with this theory.
68 Coleman, supra note 42, at 10–11.
69 Id.
70 See Zipursky, Civil Recourse, supra note 44, at 716, 734–35.
71 See Coleman, supra note 42, at 9.
This is by no means a fatal strike, but a theory that can explain how the structure of the legal system is an instantiation of the normative principles undergirding that area of law has an advantage over one that does not. In addition, such a theory can help explicate the difference between tort law and criminal law. Civil recourse theory has these advantages, as I will explain further below.33

D. Recourse Theory’s Need for Normative Justification

Civil recourse theory has quickly become a serious challenger as an interpretive theory of tort law, but it has also met with criticism.74 One criticism is that the theory suffers, as the legal theorist John Finnis put it, from a lack of “full-throated normative justification.”75 Goldberg and Zipursky see their primary task as interpretive, and as a result, have mostly avoided the task of defending a law of “civil recourse” as one that is worth having.76 Finnis puts the challenge this way: “[A]t its deepest level, this theory of civ-

72 Indeed, Goldberg and Zipursky have made this point. See Goldberg & Zipursky, Unrealized Torts, supra note 44, at 1642–46.
73 To be sure, it might seem odd to criticize corrective justice for not taking the structure of tort law seriously enough, as it has been itself criticized for taking structure too seriously. See, e.g., Kenneth W. Simons, Justification in Private Law, 81 CORNELL L. REV. 698 (1996) (reviewing WEINRIB, supra note 29). Indeed, corrective justice improved upon economic accounts significantly by explaining certain aspects of the structure of tort law: why the defendant must pay damages to a particular victim (as opposed to a general public fund to be distributed to victims) and why there is a causation requirement in tort. See JULES L. COLEMAN, RISKS AND WRONGS 382 (1992); WEINRIB, supra note 29, at 132–33. But it does not explain—as civil recourse theory does—why equilibrium is brought about by a private lawsuit initiated at the victim’s discretion, given that this state of affairs leads to underlitigation on certain legitimate claims, leaving much disequilibrium uncorrected. Zipursky, Civil Recourse, supra note 44, at 752–53.
74 See generally Calnan, In Defense of the Liberal Justice Theory, supra note 57 (criticizing recourse theory and offering an alternative “liberal” justice theory in its place); Jane Stapleton, Evaluating Goldberg and Zipursky’s Civil Recourse Theory, 75 FORDHAM L. REV. 1529, 1562 (2006) (providing reasons why the recourse theory project was “unnecessary,” “overblown in its claims, awkward and inconvenient in application,” and “internally incoherent in its account of the ‘guidance’ it claims that the law of torts sends out”).
75 John Finnis, Natural Law: The Classical Tradition, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 56 (Jules Coleman & Scott Shapiro eds., 2002). Jane Stapleton makes a version of this point as well. See Stapleton, supra note 74, at 1562 (arguing that the civil recourse theorists’ “project is actually a normative one, namely to persuade lawyers to choose the conceptual arrangements they prefer,” and if the project were framed this way, the theory would get greater traction).
76 See Zipursky, Civil Recourse, supra note 44, at 735 (“In what follows, I attempt to explain the principle of civil recourse and to show how it illuminates the structure of tort law. I will not attempt to justify this principle, except to the extent that explaining it will involve illuminating its intelligibility and normative appeal.”); id. at 755 (“I have been cautious . . . to characterize my aims as interpretive and not normative.”); Zipursky, Rights, Wrongs, and Recourse, supra note 44, at 6 (“The account I offer is intended to be a framework for a theory of tort law that is descriptive, not prescriptive. . . . I shall not be arguing that . . . the principle of civil recourse is morally correct.”). But see Goldberg, Constitutional Status of Tort Law, supra note 44, at 583 (offering an “interpretive and normative argument”).
il recourse fails by overlooking the radical dependence of descriptive or conceptual analysis on unrestricted critical engagement with issues of evaluation— with the normative truths which are the sole rational source of justifications (or condemnations). Finnis faults recourse theory for stopping short of a defense of the institution of tort law using “principles” which we can reasonably judge “to be justified.”

In my view, Finnis is right: the theory will not gain sufficient traction without a more “full-throated” justificatory defense. Without justification, it is open to critics to say, essentially: “Tort law could not possibly be aimed at providing civil recourse to victims because that sounds like vengeance, and vengeance cannot be a legitimate exercise of the State’s coercive authority.”

Indeed, Finnis says that civil recourse theory would be rejected by the classical theory of natural law. He explains: “At its root recourse theory treats as worthy the emotional impulse of the victim of wrongdoing to ‘get even,’ by ‘act[ing] against’—having recourse against—the rights-violator.” He argues that this violates the “true” natural law principle, “do not answer injury with injury.”

77 FINNIS, supra note 65, at 59.
78 See id. (italics in original).
79 Zipursky himself uses a deeply interpretive jurisprudential approach that he calls “pragmatic conceptualism,” which resists the separation of the descriptive and normative that Finnis and other legal theorists typically use. He describes the approach in part this way:

Pragmatic conceptualism suggests that a variety of concepts and principles in tort law constitute that area of the law. Identifying those concepts and principles is a large part of offering a legal theory. However, a closely related (and sometimes inseparable) part of legal theory is rendering the concepts and principles so identified intelligible from a normative point of view . . .

Benjamin C. Zipursky, Pragmatic Conceptualism, 6 LEGAL THEORY 457, 472 (2000). For a more complete explanation of this jurisprudential approach, see id. at 474–78. For a similar if distinct approach, see COLEMAN, THE PRACTICE OF PRINCIPLE, supra note 34, at 3–12 & n.12 (describing the “pragmatic method” of asking what principles are “embodied” in a legal practice, and citing Zipursky, supra).

80 FINNIS, supra note 65, at 57 (italics and alterations in original) (quoting Zipursky, Rights, Wrongs, and Recourse, supra note 44, at 85).
81 Id. According to the jurisprudential approach laid out in Pragmatic Conceptualism, the recourse theorists are identifying the concepts and principles—such as a right to recourse—at work in tort law, and rendering them “intelligible from a normative point of view.” Zipursky, supra note 79, at 472. In order to do this, they rely in large part on Lockean social contract theory. See, e.g., Goldberg, Constitutional Status of Tort Law, supra note 44, at 541–44 (explaining that Locke’s social contract theory claims that “victims of wrongs possess a natural right to reparations from wrongdoers, and that government, as custodian of individuals’ rights, owes it to them to provide a law of reparations”); Zipursky, Civil Recourse, supra note 44, at 735–37; Zipursky, Philosophy of Private Law, supra note 44, at 637–44; Zipursky, Rights, Wrongs, and Recourse, supra note 44, at 85–86 (discussing the fairness of providing an avenue of recourse using the “language of social contract theory” (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 7–10 (C.B. Macpherson ed., Hackett 1980) (1690))).

However, even if Goldberg and Zipursky are right about having said enough, from a normative point of view, to quell a certain kind of critique based on the unappealing nature of a set of vengeance-like principles allegedly at the basis of tort law, there is still an extraordinarily important question about
So it appears that recourse theory is stuck on the same problem plaguing its chief rival in the “individual justice” camp, corrective justice: the lack of both a morally appealing norm and political justification for the state to underwrite this area of law.

Goldberg and Zipursky do, in various places, point to reasons for having a system of law that provides civil recourse in place of private vengeance, realizing that even the interpretive task is not complete or persuasive without an animating aim that is not only intelligible, but also normatively justified. Their primary reasons are essentially twofold: (1) that tort law is a necessary component of an overall legal system that seeks to peaceably resolve disputes in order to prevent escalating cycles of vengeance;82 and (2) that as a matter of political theory, the state cannot take away individuals’ rights to avenge wrongs done to them without providing a substitute.83

This first argument concerning dispute resolution has the advantage of an accurate historical grounding: by all accounts, tort law originated from the King’s attempt to create a monopoly on the use of force. In place of private vengeance, the King created Writs, which enabled individuals to bring their claims to the courts.84 Indeed, this historical justification for tort law has been employed for centuries.85 But some scholars have questioned whether this normative justification is still appropriate in contemporary American society, particularly with the overwhelming majority of the tort system being made up of accidental injuries, not the assaults and batteries of yesteryear.86 Indeed, Oliver Wendell Holmes opened his influential The Common Law with precisely this argument.87

If our legal system did not have tort law to provide redress for harm caused in an auto accident with a careless driver, then the likely result would be a more robust first-party insurance market, not increased violence to get revenge, according to this view.88 If supermarkets did not have liability insurance to provide some measure of satisfaction to customers injured slipping on a wet floor, then the result might be the growth of websites or

whether the system is at the end of the day normatively justifiable. I am starting to address that question in this Article.

82 See Goldberg, Constitutional Status of Tort Law, supra note 44, at 602–03; Goldberg & Zipursky, Unrealized Torts, supra note 44, at 1641–44.
83 See Zipursky, Civil Recourse, supra note 44, at 736–37; Zipursky, Rights, Wrongs, and Recourse, supra note 44, at 84.
84 See Goldberg, Constitutional Status of Tort Law, supra note 44, at 538–41.
85 For more recent accounts, see Steven Smith, Reductionism in Legal Thought, 91 COLUM. L. REV. 68 (1991) (referring to the primary function of tort law as “dispute resolution”).
86 See, e.g., STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 63 (Quorum 1989).
87 See OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881).
Consumer Reports rankings on the maintenance of the premises at different establishments, not injured customers smashing windows. For this justification, then, to provide a strong normative grounding for recourse theory, we would need more empirical evidence demonstrating the need for such a system in contemporary society.

The other argument is that the state must provide a system of civil recourse as a matter of political theory. In Rights, Wrongs, and Recourse, Zipursky says that “where the State forbids private vengeful retribution, fairness demands that an opportunity for redress be provided by the State.” He also refers to the law of civil recourse as allowing society to “avoid[] the mayhem and crudeness of vengeful private retribution, but without the unfairness of leaving individuals powerless against invasions of their rights.” Both Zipursky and Goldberg rely heavily on John Locke’s social contract theory, with Blackstone’s Commentaries also playing a role in demonstrating that this idea is both familiar and rooted in American law. Goldberg makes a compelling case for the protection of a right to redress as a matter of constitutional theory, attempting to reinvigorate a notion of “structural due process” that once protected such a right.

But if not constitutionally required, the reason why it would be unfair to fail to provide such a system is not entirely clear. In one sense, Zipursky seems to be making a “breach-of-contract” type argument based on a social contract framework. According to this view, in moving from the

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89 Zipursky, Rights, Wrongs, and Recourse, supra note 44, at 84.
90 Id. at 85. According to Zipursky: “The statement that one has a ‘right’ to bring an action against a defendant is a way of saying that fairness demands that the state recognize an individual’s privilege to proceed against the defendant for civil recourse.” Id.
91 See supra note 81.
92 See Goldberg, Constitutional Status of Tort Law, supra note 44, at 545–59; Zipursky, Philosophy of Private Law, supra note 44, at 641–42.
93 See Goldberg, Constitutional Status of Tort Law, supra note 44, at 531–68 (arguing that a “right of redress” is embedded in the political and constitutional structure of the United States). The “structural due process” phrase is taken from Lawrence Tribe. See id. at 530 & n.18 (citing Laurence H. Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269 (1975), but changing the usage to convey the idea that “citizens enjoy rights to certain political institutions and bodies of law”). Besides looking backward to the understanding of early American elites, pre-Civil War state courts, Fourteenth Amendment proponents, and the Supreme Court after passage of the Fourteenth Amendment, Goldberg also argues that “[b]y identifying tort law’s linkages to liberty, democracy, equality, limited government, and the rule of law, I aim to explain why even today courts and legislatures have reasons to take seriously the idea that our Federal Constitution includes a right to a law for the redress of wrongs.” Id. at 606.
94 Again, their interpretive methodology may lead the recourse theorists to resist answering this question in this way. See Goldberg, Constitutional Status of Tort Law, supra note 44, at 611 (arguing that “a law for the redress of private wrongs is a basic component of our political regime”).
95 See Zipursky, Rights, Wrongs, and Recourse, supra note 44, at 85 (after making the fairness point, saying that “if we wish, we can also frame this point in the language of social contract theory”). For a fuller development of this framework, see Zipursky, Philosophy of Private Law, supra note 44, at 637–44 (using ideas from Locke and Blackstone to develop the idea that in the case of individual
“state of nature” to civilized society, individuals give up their right to personally avenge wrongs done to them, and the state has a monopoly on force.\textsuperscript{26} Of course, the criminal law is the primary means by which the state fulfills its end of the bargain to properly take action against wrongdoers, but according to the recourse theorists’ account, that is not enough. A system of civil recourse is also necessary to provide individuals with a mechanism for “getting even” in circumstances that the criminal law does not cover.\textsuperscript{97} As Zipursky puts it, “while the state takes away the liberty of private retribution, it offers a right to civil redress in its place.”\textsuperscript{98}

But as the recourse theorists are well aware, social contract theory is merely an expository device, meant to help illuminate the respective roles of the individual and the state in a liberal society, but it cannot do the necessary normative work to justify the respective responsibilities of these parties.\textsuperscript{99} That is, we need to know why fairness demands a system of civil recourse that is independent of the “terms” of the social contract itself. We need an affirmative explanation of the appropriate role of the state and the “place” of tort law in a liberal society.\textsuperscript{100}

I suspect that we lack an adequate affirmative account in part because it seems normatively unattractive to defend the desire to “act against” another.\textsuperscript{101} In fact, Goldberg and Zipursky acknowledge that their conception of recourse may appear “archaic or barbaric because it links torts to vengeance or retaliation.”\textsuperscript{102}

Indeed, to say (as Zipursky does) that it is \textit{unfair} to forbid private retaliation without providing an adequate substitute through law is necessarily a validation of vengeful feelings. To validate vengeful feelings does seem “barbaric.”\textsuperscript{103} In a sense, this theory suggests that if a speeding driver rear-wronged, the rejection of purely private aggression is replaced by the empowerment of private parties to alter the legal status of wrongdoers, through a civil process that includes the state” (italics omitted)).

\textsuperscript{96} Zipursky, \textit{Rights, Wrongs, and Recourse}, supra note 44, at 85–86.

\textsuperscript{97} Zipursky, \textit{Civil Recourse}, supra note 44, at 737.

\textsuperscript{98} Zipursky, \textit{Rights, Wrongs, and Recourse}, supra note 44, at 86. \textit{See also} Benjamin C. Zipursky, \textit{Two Dimensions of Responsibility in Crime, Tort and Moral Luck}, 9 THEORETICAL INQUIRIES L. 97, 110 (2008) [hereinafter Zipursky, \textit{Two Dimensions of Responsibility}] (“[A] central normative reason for having a form of law like this is that the empowerment of private parties who have been wronged to an avenue of recourse against the wrongdoer is part of a social contract, softening the force of the more general prohibition on retaliation against wrongdoers.”).

\textsuperscript{99} Zipursky acknowledges this in Zipursky, \textit{Philosophy of Private Law}, supra note 44, at 642 (“The Lockian social contract metaphor cannot take much pressure, as sympathetic critics from Hume to Rawls have pointed out.”).

\textsuperscript{100} Ripstein, \textit{Tort Law in a Liberal State}, supra note 37, at 9.

\textsuperscript{101} A version of this “normatively unattractive” argument was made in Emily Sherwin, \textit{Compensation and Revenge}, 40 SAN DIEGO L. REV. 1387 (2003). Another reason may simply be that their interpretive methodology of “pragmatic conceptualism” resists a clean separation between the descriptive and normative.

\textsuperscript{102} Goldberg & Zipursky, \textit{Unrealized Torts}, supra note 44, at 1644.

\textsuperscript{103} \textit{See id.}
ends you, you are justified and acting as a reasonable person would in civilized society to want to punch him in the face. Shying away from fully justifying this conclusion, though, is a mistake. Indeed, since Finnis’s justification challenge, Goldberg and Zipursky have moved in a somewhat more normative direction, though still within their deeply interpretive methodology. Specifically, they have discussed the role of tort law in developing “loci of responsibility” among individuals as a possible justification or purpose for tort law.¹⁰⁴ In a piece authored alone, Goldberg also points to ideals of equality in American political theory generally and in the Fourteenth Amendment specifically as a justification for a law of civil recourse.¹⁰⁵ In my view, the equality justification is more promising than the “loci of responsibility,” but I will discuss both below when addressing the political justification for a state-sponsored system of civil recourse in Part III.

For now, I pick up below where Zipursky’s fairness rationale leaves off: asking why we might be justified in having these resentful feelings, and why it might be unfair not to offer a substitute for private vengeance. Though I focus on civil recourse theory, the hope is that the discussion might contribute to thinking about corrective justice as well.

II. THE MORAL FOUNDATIONS OF RECURSE THEORY

In this section, I start where Zipursky concluded in identifying the normative basis for the principle of civil recourse that, he argues, is at the

¹⁰⁴ Goldberg, Constitutional Status of Tort Law, supra note 44, at 608–10 (explaining how, “[a]s a body of law that carves out these loci of responsibility, tort helps to maintain a version of civil society that is distinctively liberal”); Goldberg & Zipursky, Accidents, supra note 24, at 368; accord Goldberg & Zipursky, Internal Point of View, supra note 44, at 1564, 1575–77 (using H.L.A. Hart’s account of the “internal aspect” of rules to bolster the notion of tort as a law of “genuine duties” of conduct among individuals); Goldberg & Zipursky, Moral Luck, supra note 44, at 1151–57, 1164 (“[W]e have shown that the idea of responsibility within tort law meshes well with familiar and powerful everyday judgments about responsibility that are deeply embedded in social practices.”).

¹⁰⁵ See Goldberg, Constitutional Status of Tort Law, supra note 44, at 607 (“As the framers of the Fourteenth Amendment understood, to render a person capable of suing (and being sued) for injuries suffered (and caused) is to enforce a conception of equality. Each of us is in principle accountable to each other; none is above or below the law.”). In coauthored work, Goldberg and Zipursky also suggest some support for this idea, though they do not defend or develop the claim in any detail. See Goldberg & Zipursky, Accidents, supra note 24, at 369 (arguing that tort law, as a law of “responsibilities and redress,” connects “in deep ways to basic principles of liberty and democratic equality,” contributes to “the maintenance of social cohesion within a dynamic and generally individualistic culture,” and “affirms the notion that each of us is equal in owing and being owed various obligations by others”); Goldberg & Zipursky, Moral Luck, supra note 44, at 1167 (“In holding all persons—rich and poor, powerful and powerless—to the same duties and by empowering each to seek redress when duties are breached and injuries result, tort law embodies and enforces notions of social equality.”). See also Goldberg & Zipursky, Accidents, supra note 24, at 406 (posing that the idea of civil recourse allows individuals to be independent of both the government and of “other private individuals’ assertions of power and will over them,” thereby “equalizing power,” “disbursing power to hold individuals accountable,” and reducing reliance upon government).
core of tort law. I argue that “acting against” another in response to wrongdoing is a distinctive form of “moral address,” and one which is particularly salient in a society based on liberal individualism, like ours. This form of moral address is instantiated in the Anglo-American tort system, where individuals make the decision to file lawsuits in response to wrongdoing and prosecute those lawsuits themselves, rather than relinquish that prosecutorial responsibility to the state. Understanding our tort system as an instantiation of this distinctive form of moral address provides the conceptual foundation for civil recourse theory, and perhaps other tort theories based on individual justice.

Below, I break down the necessary components of the justification for a right to civil recourse. In order to identify the normative basis for civil recourse, we must ask why the accidentally harmed person is:

(1) entitled to feel resentful towards, or angry at, the defendant;
(2) morally justified in “acting against” the defendant in some fashion; and
(3) given access to a state-sponsored mechanism for doing so?

Drawing on moral theory, section A looks at the first of these steps and section B the second. This is the heart of the paper: an attempt to provide the conceptual foundation for a normative defense of civil recourse theory. In Part III, I turn from the moral and conceptual underpinnings of a right to recourse to the third step: political justification. What I offer here is more tentative, as I begin to explore the justification for the state’s involvement in providing an avenue for individuals to “act against” those who have wronged them.

A. Entitled to Feel Resentment

The first step examines why the person harmed is entitled to feel resentful towards the injurer. This really consists of two subparts—first, that the act of the putative defendant was truly a wrong and a wrong as to the person harmed, and second, that resentment is an appropriate reaction.

1. The Wrong in Accidental Harm.—The overwhelming majority of the tort claims in the United States are some kind of negligence claim. Any interpretive theory of tort law, like the one I am offering here, must therefore make sense of these claims as wrongs.

At one level, viewing accidental harms as wrongs seems fairly straightforward: a person has acted carelessly and caused harm to another.

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106 See CAROL J. DEFRAENCES ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 2, 11 (U.S. Dep’t of Justice 1992), available at http://www.ojp.usdoj.gov/bjs/abstract/cjcvilc.htm (finding that out of 377,421 tort cases, 277,087 were automobile accident cases and 65,372 were premises liability cases based on “the dangerous condition of residential or commercial property”).
Indeed, judges and lawyers have little trouble discussing negligence claims in moral terms such as these. But the objective, reasonable-person standard in negligence law has long complicated the categorization of these accidents as wrongs.\footnote{DAN B. DOBBS, THE LAW OF TORTS § 118 (2000). Another important source of resistance is the causation requirement, which arguably draws a morally arbitrary distinction between one who is held liable because her careless behavior happens to cause harm, and one who behaved in exactly the same way but was fortunate that no one was harmed by her carelessness. This issue is discussed in Goldberg & Zipursky, Moral Luck, supra note 44.} If we are going to hold people to a single, objective standard regardless of their capabilities, such that even people who are naturally careless and simply incapable of meeting a standard of reasonable care will be held liable, then we are not making moral judgments about people that would warrant the use of the word “wrong.”\footnote{SLEIGHT OF HAND, 48 WM. & MARY L. REV. 2033–41 (2007) (explaining the “civil competency” theory of the reasonable person standard); see also Patrick J. Kelley, WHO DECIDES? COMMUNITY SAFETY CONVENTIONS AT THE HEART OF TORT LIABILITY, 38 CLEV. ST. L. REV. 315 (1990) (discussing the “community norms” theory of the reasonable person standard).} After all, think about the famous Menlove in the hay-stacking case \textit{Vaughan v. Menlove}\footnote{Vaughan v. Menlove (1837) 132 Eng. Rep. 490 (C.P.), 3 Bing. N.C. 468.} if he were simply terrible at stacking hay, regardless of how much training he received or care he took, then he would not properly be called a wrongdoer, no matter how much harm ultimately resulted from his actions.\footnote{See HOLSOM, supra note 87, at 145–63.} And yet, under the objective standard, he was held liable for not performing up to the reasonable person standard of care.

Nonetheless, it is quite plausible to have standards of conduct that are broadly applicable to members of the community, regardless of individual strengths and weaknesses, and to regard the failure to achieve those standards of conduct as wrongful, even when this failure is not reflective of moral shortcomings.\footnote{Nonetheless, it is quite plausible to have standards of conduct that are broadly applicable to members of the community, regardless of individual strengths and weaknesses, and to regard the failure to achieve those standards of conduct as wrongful, even when this failure is not reflective of moral shortcomings. Indeed, we can think of the reasonable person standard as a social obligation that individuals must live up to; if they are unable to live up to this standard while engaging in certain activities, they must forego those activities altogether in order to avoid wrongdoing.} Indeed, we can think of the reasonable person standard as a social obligation that individuals must live up to; if they are unable to live up to this standard while engaging in certain activities, they must forego those activities altogether in order to avoid wrongdoing.\footnote{Others, including Goldberg and Zipursky, have written about this recently as a problem of “compliance luck.” See, e.g., Goldberg & Zipursky, Moral Luck, supra note 44, at 1143–63.}

In fact, although there is a lack of a consensus in tort law on the content of the “breach” standard in negligence—an improper cost–benefit anal-
ysis, an unjustified disregard of risks to others, or something else—at some level of generality, there is agreement enough in justice- or rights-based theory about what the wrong is. As Zipursky puts it:

Rights theorists . . . seem to agree upon the following, frankly Kantian, view: individuals are entitled, as a matter of political morality, to a substantial level of respect and vigilance for their physical integrity—as well as their property. The standard of care of negligence law is best understood as an effort to capture this moral idea. The standard requires that risks not be taken to someone’s physical integrity that are inconsistent with that level of respect and vigilance.\(^{113}\)

Justice-based theorists have characterized this moral idea in a number of ways. Some have treated the wrong as using another person as a means to your own end, continuing a Kantian tradition;\(^ {114}\) others as a violation of social norms;\(^ {115}\) still others as taking disproportionate risks to other persons or property for a relatively minor benefit to oneself.\(^ {116}\) One criminal law theorist refers to the “basic moral vice of insufficient concern for the interests of others.”\(^ {117}\)

Zipursky has begun to sketch an account of the wrong as not living up to a standard of “civil competency” that one is required to attain in order to participate in society.\(^ {118}\) “I didn’t mean any harm” is an acceptable excuse for children, but adults are expected to take care to avoid harm to others and are faulted when they fail to do so.

Although the Restatement (Third) adopted a definition of a breach of reasonable care in terms of a “risk-benefit” approach that is most consistent with the Hand formula at the heart of the economic account, it can easily be framed in more Kantian or justice-based terms, and the Restatement itself does not adopt a strict economic efficiency version of this “balancing” approach.\(^ {119}\)

\(^{113}\) Zipursky, Sleight of Hand, supra note 112, at 2030.


\(^{115}\) See, e.g., Steven Hetcher, Creating Safe Social Norms in a Dangerous World, 73 S. CAL. L. REV. 1 (1999); see also Kelley, supra note 112.

\(^{116}\) See, e.g., Richard W. Wright, Negligence in the Courts: Introduction and Commentary, 77 C There is a Prohibitive Cost” Theory].


\(^{118}\) For the moment, I want to remain agnostic on these possibilities.

\(^{119}\) See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005) (“Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.”). But see Ronen Perry, Re-Torts, 59 ALA. L. REV. 987 (2008), for a criticism of the Restatement’s definition of negligence as unwisely adopting the Hand formula.
We can also think of the wrong as a “free rider” problem, or a unilater-
al alteration of the terms of social relations. We have, in liberal societies,
an agreement among ourselves: you do what you want to do, and as long as
you don’t bother me, I’ll stay out of your way. By harming me for the pur-
suit of your own ends, you have breached the terms of our social contract.
Or maybe you’ve just unilaterally changed them to read: “I will do what I
want, no matter what the consequences are to others.” Either way, you have
behaved wrongfully, and wronged whomever you have harmed.

Most simply, under any of these formulations, a person was wronged
because the defendant exercised too much liberty in violation of the injured
party’s security. This is a “wrong” because the role of each individual in a
liberal state is to use her own resources to achieve her own ends, as she so
chooses. But the corresponding responsibility is that a person must not
use someone else’s resources in pursuit of her own ends without that per-
son’s consent. If a person pursues her own ends with insufficient attention
to another’s well-being (negligence), she violates her role in liberal soc-
ety.

2. An Apt Feeling.—Within this general framework, we can see it is
plausible that the injured person is entitled to have the “reactive attitude of
resentment,” to use Peter Strawson’s terms. The negligent actor has unilate-
raly changed the terms of social relations by elevating her liberty inter-
est too far above the injured person’s security interest.

When one believes he has been harmed by someone’s carelessness, re-
sentment is a “rational” attitude to adopt towards that person. By “ration-

\[\text{\textsuperscript{120}}\text{ See Ripstein, The Division of Responsibility, supra note 114, at 1832–33.}\]

\[\text{\textsuperscript{121}}\text{ Arthur Ripstein lays out a view of the wrong in terms like these in his book EQUALITY, RESPO-
NSIBILITY AND THE LAW, supra note 29, and in subsequent work. See Ripstein, Closing the Gap, supra note 112, at 72–80; see also Ripstein, The Division of Responsibility, supra note 114; Arthur Rip-
stein, Private Law and Private Narratives, 20(4) O.J.L.S 683 (2000); Arthur Ripstein, Private Order and Public Justice: Kant and Rawls, 92 VA. L. REV. 1391 (2006); Ripstein, Tort Law in a Liberal State, su-
pra note 37. Goldberg has criticized Ripstein’s notion of reasonableness in negligence law, which
requires a balancing of liberty and security, as being too thin a concept, and unable to explain vast swaths
of tort law (like product liability). See John C.P. Goldberg, Rights and Wrongs, 97 Mich. L. REV. 1828,
think Goldberg is too hasty in dismissing this notion. When a pharmaceutical company, for example,
does not put a warning on a prescription medicine, one can say that the company, its executives, and its
shareholders are pursuing their own ends (sales and profits) with insufficient regard for the safety and
security of others (customers). To be sure, the concept is just that—a concept—and it does not provide
actual answers to questions of how the liberty and security interests should be balanced in particular cir-
cumstances, but it does provide a framework for addressing the question.}\]

\[\text{\textsuperscript{122}}\text{ P.F. Strawson, Freedom and Resentment, in PROCEEDINGS OF THE ARISTOTELEAN SOCIETY 48
(1962). See also Goldberg & Zipursky, Moral Luck, supra note 44, at 1154 (“[V]ictims of these norm
violations are likely to regard themselves as having been wronged and tend to have comcomitants feel-
ings of resentment and blame in response.”) (citing P.F. Strawson, supra).}\]

\[\text{\textsuperscript{123}}\text{ A related idea is that resentment is in some sense a “natural” emotion, common and inevitable in
any society where individuals hold one another to expectations. See R. JAY WALLACE, RESPONSIBILITY\]
al,” I mean that the attitude is understandable or “makes sense” because there is a norm that has been violated. We accept that there is such a norm, the violation of which is a moral wrong such that the violator is to be blamed.124 If he is blameworthy, then it is rational for the harmed person to resent him.125 I do not mean by “rational” that the feeling is clearly the appropriate one to adopt (assuming such a choice is possible) after a cost–benefit analysis. Rather, we might say that resentment towards a wrongdoer, after being harmed by that person’s wrongdoing, is rational in that it is an “apt feeling,” as Allan Gibbard puts it.126

Resentment is a key part of our moral practices of responsibility. By resenting someone who has wronged us, we adopt an attitude that holds them responsible for our harm.127 The philosopher Jay Wallace says that the reactive emotion of resentment can be best understood in terms of the “quasi-evaluative stance of holding people to expectations.”128 This seems right. When we resent someone, it is because we believe that the person has violated some standard, whether implicit or explicit, to which we hold them and are entitled to hold them.129 In the case of negligence law, the standard would be the demand or expectation that a person take due care to avoid causing harm to others.130 The resulting attitude of resentment, then, can be seen as a form of moral responsibility or accountability for the breach of that expectation. Another natural reaction might be disappointment, but that attitude might not translate into holding the other accountable.131 Nonetheless, it is one thing for a person to hold another accountable in private, but it is another to actually “act against” them in some form.

Even if there might be certain circumstances where acting against a wrongdoer is somehow justified, some argue that this is not acceptable in cases of accidental harm.132 After all, these instances of harm are, by definition, unintentional; one assumes that there was no animus displayed by the other person. The oft-heard phrase “accidents happen” embodies the ap-

125 Id. at 45.
126 Id.
128 WALLACE, supra note 123, at 62.
129 Id. at 245.
130 See Gideon Yaffe, Reasonableness in the Law and Second-Personal Address, 40 Loy. L.A. L. Rev. 939, 960 (2007) (arguing that we can see a negligence case as an effort on the part of the plaintiff to “successfully execute an act of second-personal address of a second-personal reason”).
131 Thanks to Gautam Huded for this suggestion.
propriate posture of fatalism we are expected to take towards accidents.\textsuperscript{133} To want to act against the injurer would be disproportionate and unwarranted, according to conventional ways of thinking about accidental harm.\textsuperscript{134}

In the next section, I take on this conventional view, illustrating the normative appeal of acting against people who have wronged you.

\textbf{B. The Normative Appeal of Acting Against One Who Has Wronged You}

In the last section, I explained that the reactive attitude of resentment is a natural response to the kind of wrong that is at the core of a negligence claim. In this section, I seek to demonstrate that actually acting against one who has wronged you is often morally appropriate and desirable. To do so, I employ a relatively new framework on moral philosophy—the second-person standpoint, developed largely by Stephen Darwall\textsuperscript{135}—to explicate this normative appeal and show how it might be fundamental to the moral order of a liberal society. Then, in Part III, I explore why the state might underwrite such a moral order through an institution like tort law.

I have described above why we might think of the carelessness at the heart of negligence as a moral wrong warranting the reactive attitude of resentment, to use Strawson’s terms.\textsuperscript{136} That still begs the question, though, about whether we ought to “let go” of that feeling of resentment and “move on,” or whether actually channeling that resentment into “acting against” another is an appropriate response.\textsuperscript{137} To be clear, my task here is not to explain people’s motives for “acting against” wrongdoers, but rather to explain the normative appeal of such a practice.\textsuperscript{138} Goldberg and Zipursky

\textsuperscript{133} Indeed, Allstate’s “Accident Forgiveness” insurance plan is premised on such a notion. The insurance company’s advertisement for the plan reads: “Accidents happen—we’re all human. That’s why Allstate offers Accident Forgiveness. It keeps your car insurance rates from going up just because of an accident—even if it’s your fault.” See Allstate.com, Auto Insurance: Innovative Policy Features with Your Choice Auto, http://www.allstate.com/autoinsurance/autoinsurance-features.aspx (last visited Sept. 24, 2009).

\textsuperscript{134} This is why punitive damages are only allowed in cases involving intentional or reckless wrongdoing. See DOBBS, supra note 107, at § 381.

\textsuperscript{135} See generally DARWALL, THE SECOND-PERSON STANDPOINT, supra note 127.

\textsuperscript{136} See generally STRAWSON, supra note 122.

\textsuperscript{137} This debate still rages on among today’s female pop vocalists (and former American Idols, no less). In her song “Since U Been Gone,” Kelly Clarkson sings of the liberation that comes with moving on from an ex, while, in contrast, Carrie Underwood praises the satisfaction that comes from getting revenge on a cheating ex by taking a Louisville Slugger to his car in her hit song “Before He Cheats.” KELLY CLARKSON, SINCE U BEEN GONE (RCA Records 2004); CARRIE UNDERWOOD, BEFORE HE CHEATS (Arista Records 2006). See also Jessica Yadegaran, Beyond ‘Respect’: Women Spell Out R-E-V-E-N-G-E in Songs, Videos, POPMATTERS, May 25, 2007, http://www.popmatters.com/pm/news/article/41665/beyond-respect-women-spell-out-r-e-v-e-n-g-e-in-songs-videos (discussing the recent trend of “revenge fantasy” songs by today’s female pop singers). Thanks to Tyler Bryant (UGA ’08) for situating this debate in pop culture.

\textsuperscript{138} The importance of the distinction will become clear later in this section when looking specifically at filing a lawsuit as the mechanism for “acting against” wrongdoers. My point is that looking at in-
have thus far resisted this task: speaking of “the principle of civil recourse,” they explained: “Our point here is not that such a principle is demanded by principles of justice, or even morally sound, but that it is the animating idea behind our system of tort law.”\(^{139}\) However, as I have indicated, I believe the principle needs more of a defense grounded in moral norms or principles in order to gain any traction.

There are a number of ways we could deal with the feeling of resentment. One thing we could do with resentment is simply let it simmer. This was Nietzsche’s concern when he discussed the danger of *resentiment*.\(^{140}\) Alternatively, we could discuss what happened with friends or family: “Can you believe she did that to me?” Or, we could simply “let it go” and “move on.”

The final possibility is to “act against” the other person or business in some fashion, such as by filing a lawsuit. I define “acting against” as speech or conduct directed towards an alleged wrongdoer to express blame or make a demand in response to being harmed.\(^{141}\) I use this particular phrase as the focal point for analysis because it is used by both the recourse theorists and Finnis in challenging them.\(^{142}\)

Here, I want to make the case briefly that acting against another can be an appropriate response, even a necessary or desirable one, and need not be violent or unmediated. My aim here is not to contribute to the philosophical literature on the topic, but rather to use that literature to help illuminate the normative attractiveness of a social practice where people are empowered to act against those who have wronged them.

Defenders of vengeance frequently say that the appropriate response to wrongdoing is a “hostile” one.\(^{143}\) But even hostile responses can come in many forms, ranging from pulling a gun on the wrongdoer to filing a lawsuit against her. Perhaps an even milder version, simply asking for an apology, might qualify as “acting against” as well. And, of course, the version of “acting against” at issue here—the filing of a tort lawsuit—goes a step beyond simply private conduct or speech, by enlisting the assistance of the state to punish the wrongdoing.

1. *The Second-Person Standpoint on Morality.*—Before we address filing lawsuits, we should first consider how we should think about the role of “acting against” another in a moral community. Moral philosophers

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\(^{143}\) See, e.g., Peter French, *The Virtues of Vengeance* 187 (2001).
have generally considered questions about morality from either first-person perspectives—practical deliberation about “what ought I to do?”—or third-person perspectives about “what people ought to do.” Recently, the moral philosopher Stephen Darwall has outlined another viewpoint that he believes is critical to understanding moral obligation and responsibility: the second-person standpoint.\(^{144}\) This view captures something important about our moral practices that is not adequately accounted for by the other two perspectives, according to Darwall. In this section, I suggest that Darwall’s work can help illuminate the normative appeal of civil recourse theory. Under this system, individuals can hold one another to account for having wronged them.\(^{145}\) Indeed, I think much of what I discuss below is quite consistent with what the recourse theorists have said already, but gives it a firmer and more explicit moral grounding.

For Darwall, the second-person standpoint is the “perspective you and I take up when we make and acknowledge claims on one another’s conduct and will.”\(^{146}\) Darwall explains that much of our moral practices can best be accounted for by a set of “second-personal reasons” whereby one person makes demands on another, and the addressee acknowledges the person’s authority to make such demands.\(^{147}\) This perspective, Darwall argues, is critical in understanding well-known moral theories like the Golden Rule,\(^{148}\) Kant’s categorical imperative,\(^{149}\) and John Rawls’s idea of “rightness as fairness.”\(^{150}\)

Darwall introduces what he calls a circle of second-personal concepts that work in tandem, one leading logically to the next: the second-personal authority of the person making a claim, making a valid claim or demand, grounded in a second-personal reason, and therefore implying responsibility of the addressee back to the person making the claim.\(^{151}\) Together, Darwall

\(^{144}\) See generally DARWALL, THE SECOND-PERSON STANDPOINT, supra note 127.


\(^{146}\) See DARWALL, THE SECOND-PERSON STANDPOINT, supra note 127, at 3.

\(^{147}\) Id. at 4–8. He actually claims that much of our moral practices are “irreducible” to other standpoints, id. at 11, but I need not adopt this claim for my purposes. Nor do I need to embrace Darwall’s claim that his observations about the second person standpoint lead naturally to a contractualist account of law as offered by T.M. Scanlon and John Rawls. See DARWALL, THE SECOND-PERSON STANDPOINT, supra note 127, at 300–20. For a critique of Darwall on these and other grounds, see R. Jay Wallace, Reasons, Relations, and Commands: Reflections on Darwall, 118 ETHICS 24 (2007).


\(^{149}\) See id. at 32–35.

\(^{150}\) See id. at 309–10 (quoting John Rawls, Kantian Constructivism in Moral Theory, 77 J. PHIL. 515, 525 (1980)).

\(^{151}\) Id. at 11–12.
argues, these constitute a particular kind of “practical authority” that is fundamental to our moral practices.\footnote{152} For Darwall, much of what we understand as “moral wrongs” derives its wrongful character from the fact that one can either demand that you refrain from certain conduct or hold you accountable for the injurious consequences of such conduct.\footnote{153} In having the authority to make such claims on one another, we have established the norms of mutual respect and accountability in our community. He calls this “morality as equal accountability.”\footnote{154}

Darwall starts with the example of a person stepping on another’s foot.\footnote{155} We can think of a number of reasons why the offender might decide that the better course of action is to remove his foot. One reason comes about from a first-person inquiry—what should I do?—which can be answered with first-person reasoning—what would I want if I were in the position of the other? Another possibility is a third-person reason—that is, one considers what kind of society hers ought to be, and decides a good society is one in which people do not intrude onto others physically without a compelling reason.\footnote{156} One can think of economic justifications familiar to tort scholars as this kind of third-party reason: the injurer might conclude that in order to avoid further damage to the shoes, he should remove his foot because he is the “cheapest cost-avoider,” and so his acting to prevent further harm would be best for society, in contrast to the person stepped on or a third party.\footnote{157}

Another reason can be derived from what Darwall refers to as the “second-person standpoint.”\footnote{158} That is, that the person who is being stepped on says to the offender either explicitly or simply with a look: “Why don’t you step off the shoe, pal.” The authority of the person making the demand or request is derived from his status as a morally accountable equal in society, one who wants to pursue his life plans without unwarranted intrusion from others. And the offender accedes to the demand because he accepts the moral authority of the person stepped on to make such a demand.\footnote{159}

\footnote{152} Id. at 11.
\footnote{153} See id. at 99 (“There can be no such thing as moral obligation and wrongdoing without the normative standing to demand and hold agents accountable for compliance.”).
\footnote{154} Id. at 101.
\footnote{155} Id. at 5–6.
\footnote{156} Id. at 5 (“In desiring that you be free of pain, he would see this possible state of affairs as a better way for the world to be.”).
\footnote{157} This idea was made famous by Guido Calabresi. For an introduction to this theory, see GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).
\footnote{158} See DARWALL, THE SECOND-PERSON STANDPOINT, supra note 127, at 3.
\footnote{159} Darwall acknowledges that this kind of second-person reasoning can be seen as consistent with first-person reasons, but argues that it is quite inconsistent with third-person reasons. See id. at 9–10.
Seen this way, we can understand more about the role of Strawson’s “reactive attitudes” like indignation and resentment. As Strawson pointed out and Darwall reminds us, these attitudes are implicit demands that another be held accountable for not behaving according to the standards expected of him. These reactions have a second-personal “conceptual structure” — the attitude runs from me to you. That we recognize these reactive attitudes as legitimate necessarily entails a commitment to the second-person standpoint implicit in such attitudes: the authority to stand before another and say: “You have wronged me.” This works in mutually reinforcing ways: in structuring our relations (perhaps in part through an institution like tort law), we help define the circumstances in which the reactive attitude of resentment is appropriate when one has been harmed by carelessness. Darwall’s view of morality as equal accountability is, of course, heavily Kantian. By acknowledging people’s authority to make such claims or demands on one another, we treat them as part of a “realm of ends.” Similarly, for Darwall, the Golden Rule—“Do unto others as you would have them do unto you”—is a perfect example of his views. Though one can conceive of this in a first-person sense, suggesting how an ethical person ought to behave, or a third-person sense, viewing it as a good rule for a well-functioning society, Darwall sees it as fundamentally second-personal. Just beneath the surface of both the Golden Rule and Kantian categorical imperative is a second-personal justification based on reciprocity: “You can make demands of others, but you must also respond to others’ demands of you.”

2. Affirming Self-Respect and Moral Worth.—With Darwall’s framework in mind, we must consider the importance of acting against wrongdoers in a moral community. By acting against one who has wronged us, we are essentially saying: “You can’t do that to me.” In doing so, we affirm our moral worth, self-respect, and dignity. The philosopher Jean Hampton describes the idea of a “moral injury” as “an affront to the victim’s value

160 See Strawson, supra note 122.
162 See id. at 73 n.19. Darwall uses Alanis Morissette’s song “You Oughta Know” to make this point.
163 See id. at 141.
164 This is a modified version of Kant’s “kingdom of ends.” See id. at 306.
165 Id. at 115–17 (placing the Golden Rule squarely within the “second-personal circle of concepts” discussed in the book).
166 See Jean Hampton, Correcting Harms versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. REV. 1659 (1992) [hereinafter Hampton, Correcting Harms]. To be sure, Hampton did not appear to believe that this kind of “moral injury” had occurred in all tort cases. See id. at 1664–65 (citing as examples where “moral injury” is not at issue both Vincent v. Lake Erie Transportation Company, 124 N.W. 221 (1910), and a hypothetical case where a slightly careless driver slips on the road on a rainy day after rounding a turn and hits another car). Anthony Sebok relies heavily on Hampton’s no-
or dignity.” Acting against the wrongdoer is a means by which the victim can negate this affront. Where the wrong has “diminished” the value of the victim, the retributive response that Hampton discusses “is intended to vindicate the value of the victim” and restore her to the status of an equal.

On the other hand, being too hasty to forgive, or too reluctant to confront, might allow the moral diminishment to remain intact. We instinctively favor the idea of forgiveness as an appropriate and morally superior way of responding to one who has wronged us. But an important strain in philosophical thought questions the moral superiority of forgiveness. The philosopher Jeffrie Murphy, for example, suggests three reasons—self-respect, self-defense, and respect for the moral order—why we ought not be so quick to forgive, and why some measure of resentment is good. We might also (and some do) frame these first two reasons as being about maintaining personal honor or individual dignity.

Vindication by the state, when it acts against the wrongdoer on our behalf, can underscore our moral worth as well. But perhaps we enjoy the best of both worlds when, instead of acting alone, we act against the wrongdoer through a state apparatus (like tort law): being the one to call a wrongdoer to account might affirm our self-respect, while the state backing our impulse by giving us a forum to do so affirms our moral worth in the community.

Criminal law theorists often refer to the function of criminal law as being, in part, aimed at “restoring the moral order.” If we let criminal wrongs go unpunished, the norms against such actions will weaken, and members of the community will be less secure. Indeed, if the role of acting against a wrongdoer operates in part to reinforce the moral order, then one could argue (and many have) that not acting against the wrongdoer, even out of a desire to forgive, should be frowned upon. As William Ian Miller put it in discussing honor cultures: “Honor did not allow for refusing to re-

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167 See Hampton, Correcting Harms, supra note 166, at 1666.
168 See id. at 1673–75.
169 Id. at 1686. Though unlike tort law, the retributive justice that Hampton discusses is delivered through the state and criminal laws.
170 See generally JEFFRIE G. MURPHY, GETTING EVEN (2003) (offering a qualified defense of vengeance, and suggesting that forgiveness is appropriate only in limited circumstances); ROBERT SOLOMON, A PASSION FOR JUSTICE 272–86 (1995) (explaining that “vengeance is the original passion for justice”).
171 See MURPHY, supra note 170, at 18–20.
173 Though this is an empirical question, it seems intuitively plausible that taking the action oneself might serve self-respect values in ways that the state or another doing so might not.
Perhaps if too many failed to act against those who wronged them, the moral order would be harmed.

3. **Moral Responsibility Ascription.**—In acting against a wrongdoer, victims play a role in ascribing moral responsibility. As a practical matter, in many circumstances, only the harmed person can say: “I know what you did.” Without the victim acting against the wrongdoer, the wrongdoer might not be held responsible at all.

   Indeed, some philosophers have argued that we cannot have a coherent secular conception of moral responsibility without the practice of victims holding wrongdoers to account. That is to say, the very idea of being morally responsible to one another (as opposed to God) is fundamentally linked to the victim’s reactive emotion of resentment and the practice of the victim holding the wrongdoer responsible for his actions. By engaging in this practice, we create moral communities, not only by ascribing moral responsibility once harm has been caused, but in defining the moral obligations themselves. Indeed the very definition of a moral obligation might be a prohibition or requirement which, if violated, makes one susceptible to being held to account.

4. **Accountability of Equals.**—To act against another who has carelessly harmed you is to object to someone who has violated the terms of social interaction by taking more than his share of liberty in violation of your security. By responding to this action, the injurer reinforces the obligation that he has to moderate the pursuit of his own ends in recognition of others’ rights to pursue theirs. If the injurer does not respond, it could be a sign that he does not value the terms of social interaction, or at least cares not to uphold them in his relations with the victim. That is why people often encourage us to act against or confront one who has wronged us.

   By acting against the wrongdoer, one demands respect. This is what Darwall refers to as “recognition respect”—respect not for one’s good character or a job well done, but simply respect for another as an equal in a moral community. Indeed, in interviews after Carol Ernst’s trial, jurors voiced anger at the lack of “respect” Merck showed for its customers by not disclosing all of Vioxx’s risks. Richard Epstein, who wrote a scornful op-ed in the *Wall Street Journal* after the Ernst verdict called “Ambush in Angleton,” suggested that this lack of respect referenced by the jurors could

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175 WILLIAM IAN MILLER, EYE FOR AN EYE 57 (2006).
176 See, e.g., FRENCH, supra note 143, at 109; Darwall, supra note 145, at 95.
178 Murphy describes this as “resentment that another has taken unfair advantage of one’s sacrifices by free riding in a mutually beneficial scheme of reciprocal cooperation.” Jeffrie G. Murphy, Forgiveness and Resentment, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 14, 16 (Cambridge Univ. Press 1988).
179 See DARWALL, THE SECOND-PERSON STANDPOINT, supra note 127, at 123, 126.
not possibly have anything to do with tort law.\textsuperscript{180} But he might well be wrong.

In the context of “recognition respect,” then, it starts to become more plausible that the waitress is forced to pay damages to Donald Trump when she rear-ends his car.\textsuperscript{181} We should not assign moral weight to the justness of restoring the previous distribution of resources, as corrective justice theorists would, but we should assign normative force to recognizing the two as mutually accountable. The waitress has to answer to Trump for the lack of recognition respect exhibited by her careless driving, just as Trump would have to answer to the waitress for the same wrong.

Carol Ernst had been a nurse all her life, and her husband worked at Wal-Mart, making $21,700 a year. Yes, she could have written a letter to Merck complaining, and she may or may not have gotten a nice form letter back—not much accountability there. She might have gone to the local prosecutors or the state attorney general to see if they might be interested in criminally prosecuting or bringing some kind of civil action against the company for fraud, and she may not have gotten in the door, been successful in encouraging an action, or been permitted a voice in that action should it have occurred. But in bringing a lawsuit, she had a forum for saying directly to the officers and directors of Merck: “I know what you did, and you can’t do this to me.” We ought to think well of her for standing up for herself and her husband and demanding that the company be held accountable.

In the next Part, I take up the question of why the state ought to underwrite a system for acting against wrongdoers, but it is worth pausing to underscore the import of Darwall’s work for the civil recourse theory of tort law. Contra the views of advocates of no-fault insurance schemes, economic theorists, and even some corrective justice theorists, the particular structure of tort law—where injured parties have the option of initiating lawsuits, prosecuting the lawsuits themselves, and addressing their claim for relief to those who wronged them—may well have value in our moral practices, and play a role in constituting a liberal society of equally accountable persons. Indeed, it may be that the structure and practice of tort law is critical to the very point of tort law itself.\textsuperscript{182}

\textsuperscript{180} Epstein, supra note 6.

\textsuperscript{181} This sort of example, pointing out the tension between corrective and distributive justice, is discussed by other scholars, including in Goldberg, Twentieth Century Tort Theory, supra note 25, at 574–75.

\textsuperscript{182} Thanks to Scott Hershovitz for suggesting a version of this point. See also John Gardner, The Mark of Responsibility, 23 O.J.L.S 157, 167 (2003) (“The fundamental point is to have structured explanatory dialogues in public, in which the object of explanation is ourselves. This point is not a point relative to which the procedure is instrumental; rather the point is in the procedure.”).
III. JUSTIFYING A STATE-SPONSORED FORUM FOR ACTING AGAINST WRONGDOERS

In the previous two Parts, I demonstrated that individuals are morally justified in feeling resentment towards, and wanting to act against, those who have carelessly caused harm to their person or property. Previous scholars have argued against tort law as a system of recourse for wrongs in part on the ground that doing so would validate vengeful feelings. In arguing that resentful feelings and the “act against” instinct are indeed morally justified, I hoped to make the conceptual space for an argument that a legal system that provides a state-created mechanism for individuals to obtain redress of wrongs is itself normatively attractive and politically justified.

That is the argument I begin to undertake here. I do so in four steps: first, I point out that such a mechanism appears to be a “cultural universal,” existing across history and cultures. Here I simply aim to persuade skeptics that the existence of such a mechanism in Anglo-American law ought not to be considered such a puzzle. Then, I consider and question a justification that the recourse theorists have put forward recently—namely, that tort law helps form and reinforce “loci of responsibility” in society. Next, I step back and isolate the precise role of the state in tort law, and why it serves this function. Finally, I begin to translate Darwall’s moral norm of equal accountability into a political justification for tort law that fits well with recourse theory.

My aim here is modest: I do not seek to demonstrate that such a system is an ineliminable part of a liberal state such that, for example, a New Zealand-style no-fault scheme would be illegitimate or otherwise unacceptable. Nor do I seek to demonstrate that the benefits of such a system outweigh its costs. Rather, I seek simply to persuade the reader that the state has good reason to support such a system, whether or not it is obligated to do so as a matter of political morality.

A. Understanding the Precise Role of the State

1. Why Should the State Get Involved at All?—Questions remain about the role of the state in bringing about private justice. That is, why does the state set up an institution—tort law—where individuals can make formal, mediated, and in some ways highly stylized claims that another has wronged them?

183 See, e.g., Finnis, supra note 75, at 56; see also CALABRESI, supra note 157, at 298 (arguing that the belief shared by individual justice theorists that there must be a connection between the injurers and the injured might stem from the idea that one should give the victim the “right to see to it that the injurer is brought to justice,” and observing that this “smacks . . . of revenge” and “stems . . . from the not very healthy urge to get even”).
First, though, we must recognize the long lineage, across cultures and throughout history, of some mechanism for responding to wrongs by acting against a wrongdoer. Anthropological studies, for example, have identified certain “cultural universals” that exist across very different kinds of societies throughout the world; among these universals are the right to redress wrongs and the provision of mechanisms for retaliation.\textsuperscript{184} Indeed, chimpanzees also appear to have a system for acting against those who have wronged them.\textsuperscript{185}

To be sure, these mechanisms have come in many different forms. In some parts of the world today, and in medieval English society under the wergeld system, clans, rather than individuals, would act against one another.\textsuperscript{186} If a member of a clan wrongfully harmed another in some way, then the victim’s clan would either act against the injurer’s clan in some way or accept compensation in order to settle the score. In societies with a strong centralized state, the state might take on the function of acting against wrongdoers for a variety of types of wrongs, similar to the way we prosecute crimes. These examples thus contradict those who think that a system of empowering individuals to act against those who have wronged them in a mediated way should not be part of a civilized society.

Nonetheless, the state could support private justice passively rather than actively, by tolerating a victim’s privately acting against a wrongdoer. That is, the state could stand quietly by while a victim goes to the injurer’s house and yells at him, breaks his window, or punches him in the nose. If the injurer tried to press criminal charges or other kinds of claims against the victim,\textsuperscript{187} the state could recognize a defense of justification by the victim, subject to some kind of proportionality review as all such defenses are.\textsuperscript{188} This system would thus allow the state to support the individual’s desire for a response from her injurer, and allow her to vindicate her own interests, thereby reaffirming her dignity and autonomy.

The state might be concerned, though, that the angry response might be less than impartial and disproportionate in too many cases relative to the

\textsuperscript{184} See Paul Robinson, Owen Jones & Robert Kurzban, The Origins of Shared Intuitions of Justice, 60 VAND. L. REV. 1633, 1683 n.215, 1683–84 (2007) (using the evidence of human universals across cultures as evidence of an evolutionary biology explanation for shared, core intuitions of justice, as opposed to social learning and other alternatives).

\textsuperscript{185} See id. at 1658.

\textsuperscript{186} See, e.g., Jared Diamond, Vengeance Is Ours, NEW YORKER, Apr. 21, 2008, at 74–87 (discussing the role of vengeance in clan warfare in the New Guinea Highlands).

\textsuperscript{187} One example of the state adopting this posture is self-defense in tort or criminal law. See, e.g., 6 AM. JUR. 2D Assault and Battery § 120 (2008) (discussing the availability of self-defense against torts of assault of battery); ROBERT E. CLEARY, JR., KURTZ CRIMINAL OFFENSES AND DEFENSES IN GEORGIA 1444 (Thomson West 2007) (discussing the availability of self-defense in criminal law).

\textsuperscript{188} On proportionality in tort law, see, for example, 6 AM. JUR. 2D Twentieth Century Tort Theory § 124 (“One cannot use force in excess of that necessary under the circumstances.”). On proportionality in criminal law, see, for example, CLEARY, JR., supra note 187, at 1461 (“A defendant may use only that amount of force necessary to defend himself.”).
original harm.\textsuperscript{189} Moreover, allowing such a response could lead to escalating cycles of violence akin to the blood feuds that in part drove the state to create a monopoly on retribution through the criminal law.\textsuperscript{190} This is the standard account explaining state involvement in private justice, but there might be another explanation. The philosopher Peter French has suggested that the danger of this system is not that the response to the wrongdoing will often be too great, but rather that it will not be enough—that is, norms would be violated at will, and people would be too fearful to respond.\textsuperscript{191} Without a proper response, the norms themselves might be undermined. Doing nothing might thus be a poor option for the state, because it would signal that the violation of norms is unimportant.\textsuperscript{192}

2. Why Should the State Not Do the Task Itself?—If the state wishes to ensure an impartial, proportionate response to accidental harms, why does the state not assume the entire responsibility itself the way it does for crimes? That is, the state could respond to cases of accidental harm by collecting a fine or other penalty, an apology perhaps, from the injurer. But the state, rather than the victim, would decide which actions to bring and would bring these actions. After all, if tort law is about restoring the moral order in some sense, then perhaps the state should enforce this moral order itself.

Alternatively, if the state is primarily concerned with accountability, we might also ask why the state does not require individuals to bring such lawsuits when they have been wronged? For example, research indicates that there is significant underclaiming of medical malpractice; many people who are harmed by medical malpractice never bring a lawsuit.\textsuperscript{193} Does this not mean that the moral order, or the balance between doctors and patients, is out of alignment?

But the nature of resentment cuts against requiring that victims act against wrongdoers. That is, resentment is rational when the other person is blameworthy, in the sense that they are proper recipients of our moral opp-
probrium. But the attribution of blame is not required. If we choose to let go of the moral emotion that induces us to take action holding another accountable, that is acceptable.

The state instead creates a system that empowers victims to bring claims, if they so choose, against the parties who wronged them. The procedural mechanisms, though not unique to tort law, nicely accommodate calling wrongdoers to account. The action begins with filing a “complaint,” and delivering the complaint to the alleged wrongdoer. The wrongdoer then provides an “answer,” explaining why her actions were not wrongful. The victim herself must demonstrate that a wrong has occurred, and that the injurer ought to be liable for it. Below I consider why we might have a normative preference for such a system.

3. Recourse Theory’s Possible Answer: Loci of Responsibility.—The question remains: why exactly should we have such a system? In recent work, Goldberg and Zipursky have discussed the idea that tort law contributes to or helps reinforce “loci of responsibility” among individuals, which consist of “spheres of interaction that come with, and are defined (in part) by relational duties: obligations that are owed by one person to others when interacting with those others in certain contexts and in certain ways.” Negligence law specifically focuses on loci of responsibility that “feature obligations to act with care for certain interests of others.” The idea is that when judges and juries decide in response to lawsuits that a duty is or is

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194 See Gibbard, supra note 124, at 47 (“[A]n observer thinks an act blameworthy . . . if and only if he thinks it rational for the agent to feel guilty over the act . . . .”); Wallace, supra note 123, at 245 (“[R]esentment requires the belief that someone else has violated a demand to which I hold them.”); Strawson, supra note 122, at 3 (noting the “familiar” sentiment that “the man who is the subject of justified punishment, blame or moral condemnation must really deserve it”).

195 Jonathan Bennett, Accountability, in Philosophical Subjects: Essays Presented to P.F. Strawson 21 (Zach van Straaten ed., 1980) (noting that some “theories offer us a way of handling accountability . . . in a manner which does not demand reactive feelings” such as blame).

196 See Jeffrie G. Murphy, Forgiveness and Resentment, in Murphy & Hampton, supra note 178. Murphy discusses forgiveness as an acceptable means of letting go of resentment, but only if it is “consistent with self-respect” and does “not involve complicity or acquiescence in wrongdoing.” Id. at 19. I would add that if there is too little “acting against” wrongdoers, this might be a threat to the moral order.

197 See Goldberg, Constitutional Status of Tort Law, supra note 44, at 607 (“Tort law involves a literal empowerment of victims—it confers on them standing to demand a response to their mistreatment.”); Zipursky, Civil Recourse, supra note 44, at 734 (“When the state has recognized a right of action, and when a plaintiff has proven it, the state . . . empowers a plaintiff to act against a defendant.”).

198 Goldberg & Zipursky, Accidents, supra note 24, at 368. See also Goldberg, Constitutional Status of Tort Law, supra note 44, at 608 (describing “loci of responsibility” as “particular contexts governed by norms of appropriate conduct that actors must observe for the benefit of identifiable classes of potential victims”).

199 Goldberg & Zipursky, Accidents, supra note 24, at 368.
not owed to another, or that the standard of care was or was not breached, they are helping to constitute these “loci of responsibility.”

To be sure, they do not offer this as the principal justification for having a state-sponsored system of civil recourse. But this does appear to be the justification that they have put forward and developed in the most detail, and so it is worth examining here. Though I agree that they have identified an important aspect of the value of tort law, I do not think this can get us the kind of normative justification that civil recourse theory needs (and that theorists like Finnis have sought). I will demonstrate why by way of example.

The mother of a fourteen-year-old girl who had allegedly been sexually assaulted by a nineteen-year-old who she met online brought a well-publicized lawsuit against the social networking site MySpace a few years ago. The mother’s argument was that MySpace was negligent in failing to implement greater security measures, which would have revealed that the man was not a high school senior, as he claimed online. One of MySpace’s defenses and its grounds for a motion to dismiss was that they had no duty to protect the girl, and this became the critical issue of the case. Negligence law is centrally concerned with defining obligations in different domains of social interaction, and this is precisely the kind of case where recourse theory ought to be of some use in thinking through the result.

How should the judge decide this case? Recourse theorists would likely suggest that the judge should reason by analogy to existing precedent, as the judge appeared to do in this case. The plaintiff here analogized this case to one involving landlords or parking lot owners who are sued for the failure to protect against foreseeable criminal conduct on their property by a

200 See Benjamin C. Zipursky, Legal Obligations and the Internal Aspect of Rules, 75 FORDHAM L. REV. 1229, 1250 (2006) (describing his and Goldberg’s work as being about “the idea that tort law assigns liability in response to its judgment that a legal obligation to the plaintiff has been violated”).

201 In fact, they are careful to limit their claim, saying that the “constructing and sustaining obligations and responsibilities owed among persons and other entities” is not precisely described as a “goal” of or even “constraint” on tort law. Goldberg & Zipursky, Accidents, supra note 24, at 405–06. Rather, they seem to be arguing that this aspect of tort law is among important “evaluative dimensions along which to measure the value of the fault system.” Id. They put it this way: “In answer to the broader, and still important question about the fault system, ‘What good is it?’, ‘It plays a major role in sustaining forms of responsibility and obligation,’ is a responsive reply.” Id. at 406. Elsewhere in the piece, they refer to tort law as “an effort to recognize, refine, reinforce, and revise obligations that are instinct in various standard social interactions.” Id. at 391.


203 Id.


205 See Goldberg & Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, supra note 44, at 740 (explaining that courts deciding duty questions ought to interpret precedent in light of various factors).
third party. MySpace responded that their status as a service provider was not analogous to that of these landowners sometimes held responsible under “premises liability” principles in tort law.\textsuperscript{206} The District Court agreed with MySpace, and held that they did not have a duty to protect the girl.\textsuperscript{207}

According to recourse theory, the judge has done his job by helping to define and refine obligations. In doing so, he has demonstrated the value of tort law in defining relational wrongs and providing recourse to victims of said wrongs. However, though this may well be part of the value of tort law, I am skeptical that it can go very far in justifying the system’s existence.\textsuperscript{208} The reasons are threefold and related: first, the court’s role here faces institutional competence problems; second, the jury—not the judge—is the principal adjudicator of what is or isn’t a relational wrong; and third, the conceptual fit is shaky between this function of tort law and the “principle of civil recourse” that is the core of recourse theory.

First, a judge adjudicating a case is not ideally situated to decide whether a social networking site ought to have a legal obligation to protect its users from foreseeable criminal harm. This is the classic institutional competence or “legal process” argument against various forms of judicial lawmaking in tort and other areas of law.\textsuperscript{209} In order to make a decision about whether there ought to be such an obligation, one would want more information on the cost of implementing greater security measures, the degree to which such security measures are likely to prevent harm, and other policy considerations. A legislature or administrative agency is in a much better position to gather and evaluate such information than is a judge adjudicating a case between two private parties.

The recourse theorists might well respond that although weighing relevant policy considerations is one way to determine such obligations, it is not the only way, and may not be the best way. Judges have for years helped define such obligations quite capably, the argument goes, by resorting to traditional methods of common-law adjudication: drawing analogies to existing precedent, looking to the obligations of similarly situated actors, and taking guidance from social norms.

But this view is complicated by the fact that in most instances, it is not even the judge who determines these obligations in deciding “duty” questions—it is the jury deciding the more-frequently litigated issue of breach. The MySpace example is somewhat unusual in that the duty issue was ac-

\textsuperscript{206} See Doe, 474 F.Supp.2d at 851–52.
\textsuperscript{207} Id.
\textsuperscript{208} To be sure, this thought experiment contains an implicit view of what counts as an adequate normative justification that would almost certainly be contested by Goldberg and Zipursky with their “pragmatic conceptualism” approach. See supra note 79.
\textsuperscript{209} See HENRY HART & ALBERT SACKS, THE LEGAL PROCESS 158–67 (1994) (introducing a “preliminary comparison of the functions and functioning of the most important of the institutions” in the American legal system)}
tually contested; in most cases, the existence of a duty is simply assumed, and then the question of whether the duty has been breached (the wrong) goes to the jury.210 These decisions, which are given by the jury in the form of a checkmark on a verdict sheet (i.e., “Yes, negligent” or “No, not negligent”), without reasons or precedential value, are the primary place in the tort system where what counts as a “relational wrong” is determined.211

One can also approach this question from an institutional design perspective: if the question is, “what is the best way for the state to contribute to the construction and maintenance of appropriate obligations among persons and entities?”212 then it seems unlikely that—at least in relatively new spheres of interaction as in the My Space lawsuit—the answer would be “by some combination of common-law judges reasoning by analogy to existing precedent and juries referencing social norms,” as opposed to “by a legislature or agency based on the relevant policy considerations.”213 If this is correct, then defining loci of responsibility seems relatively weak as a justification for having a tort law system in the first place.214

Finally, there is a weak conceptual link between the “animating idea” of civil recourse and its construction and sustenance of the obligations among individuals. While recourse theory emphasizes the “power-conferring” aspect of tort law—the plaintiff’s entitlement to recourse—the loci of responsibility justification emphasizes the “duty-imposing” aspect of tort law: the obligations of putative defendants.215 To be sure, recourse theory sees these two aspects of tort law as closely related, but the theory’s distinctiveness has centered on what the law of torts does for the plaintiff—empowering her to make demands for redress—not to the defendant. If defining and maintaining social obligations is indeed a main justification for tort law, then it is hard to see why an individual’s right to recourse against one who has wronged him would be its animating idea.216

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210 See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(b) (Proposed Final Draft No. 1, 2005) (“In exceptional cases . . . a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”) (emphasis added).

211 The jury’s role in deciding these kinds of evaluative issues in tort may be problematic for the idea of tort as a law of private wrongs. I intend to explore this issue further in future work.

212 Again, Goldberg and Zipursky might well object to this framing of the question, but I think it is useful in helping to sharpen the ultimate issue of whether the tort law system can be justified.

213 Although many areas of tort law are now governed in part by statute, the determinations of who owes obligations to whom, and what the content of those obligations are, remains decided by judges and juries.

214 Again, Goldberg and Zipursky’s claim is more limited, see supra note 201, but this section is designed to “test” the possibility that the loci-of-responsibility aspect of tort law might provide a broader normative justification for tort law.

215 H.L.A. HART, supra note 64, at 26–33 (introducing the distinction between these two kinds of rules).

216 To be sure, one could say these are merely two sides of the same coin: defining who owes responsibilities, or who is owed responsibilities. But recourse theory has emphasized the plaintiff’s role in initiating and prosecuting tort actions, and has used this to help distinguish the theory both from correc-
The recourse theorists do hint at another possible justification for tort law that has more potential. In a recent piece, Goldberg powerfully develops the idea that a “right of redress” is embedded in the political and constitutional structure of the United States.\(^\text{217}\) In examining the origins and nature of this right to redress, Goldberg suggests that a political justification for having a right to redress embedded in the legal system—indeed, having a law of “civil recourse”—is that it decentralizes power and enhances equality.\(^\text{218}\)

This notion of political or social equality, of course, is quite consonant with Darwall’s moral notion of equal accountability, described above. As such, it appears to have greater promise as a normative justification for the institution of tort law.

**B. A State-Sponsored System of Equal Accountability**

One could take Jules Coleman’s view, discussed above,\(^\text{219}\) that our particular system is essentially a contingent one, set up in the way that it is for practical reasons.\(^\text{220}\) But I want to resist that path. Rather, I think there is normative force behind the particular legal mechanism for redress because it helps vindicate and instantiate the second-person moral order that Darwall has described.\(^\text{221}\) This mechanism, which enables individuals in a liberal society to hold one another accountable, is the essence of what we mean by “tort law.” That is, it not only helps provide the answer to “What is tort law for?”\(^\text{222}\) but also “What is tort law?”

To understand this, consider for a moment, more precisely and thoroughly than we have done thus far, how our tort system is structured. It not only allows the victim to privately initiate the suit, but also to privately prosecute the suit. This may seem intuitively obvious, but it is by no means inevitable. Indeed, we could have a system similar to that found in New Zealand, where a person who is injured simply makes a claim to the state...
and receives compensation from a public fund for her injury.\textsuperscript{223} We could also have a system where the victim does not receive compensation, but rather asks the state to track down the injurer and elicit an apology. Instead, under our tort system, the victim hires a lawyer to make the claim against the defendant directly; indeed, superficially mundane service of process can be seen as vindicating second-person moral principles.

There is an additional feature of tort law that is by no means inevitable: under our system, the injurer has to respond to the victim’s accusation that he has wronged her, and if the wrong is proven to the satisfaction of a judge or jury, the injurer has to provide a remedy, usually money damages, to the victim herself, rather than to the state or anyone else. This feature, too, vindicates the notion that we owe duties to one another to moderate the pursuit of our own ends in order to protect the interests of others, and when we breach those duties, we must ourselves answer to those we harm and settle accounts.

These observations are a core part of the bilateral critique that corrective justice theory makes of economics, developed primarily by Ernest Weinrib and Jules Coleman and furthered by the recourse theorists. But even the corrective justice theorists do not have reasons for explaining why the system is set up this way, aside from Weinrib’s assertion that the doer and sufferer are locked in a “reciprocal normative embrace.”\textsuperscript{224} Below I offer some reasons to believe that the system itself has normative force.

1. Upholding the Authority of the Victim.—By giving people who are injured the opportunity to hold others accountable, the state upholds the authority of individuals to both demand that others moderate their conduct ex ante, and receive an explanation and a settling of accounts ex post. By forcing individuals to respond to a claim of wrong by another,\textsuperscript{225} we maintain their autonomy and treat them as part of a continued web of mutual obligation in our moral and political community, deserving of respect.\textsuperscript{226}

Indeed, one implicit premise of both the tort reform and preemption efforts is the questioning of the authority of the victim.\textsuperscript{227} The tort reformers


\textsuperscript{224} WEINRIB, supra note 29, at 142.

\textsuperscript{225} See id. at 107 n.65 (noting the law’s coercive authority “in subjecting wrongful action to an equal reaction that undoes the wrong”).

\textsuperscript{226} See id. at 103 (discussing this “network of reciprocal pressures”).

\textsuperscript{227} Although this is often framed as questioning the authority of juries, it implicitly questions the authority of the plaintiff who puts the question to the jury. See Michael D. Green, Prescription Drugs, Alternative Designs, and the Restatement (Third): Preliminary Reflections, 30 SETON HALL L. REV. 207,
ask the victim—plaintiff: “Who are you to second guess the expertise of the doctor who treated you?” The preemption proponents ask: “Who are you to second guess the FDA’s decision that a drug is safe enough for the market?” What authority do you have? Where do you get the right to bring this claim?

Most directly, of course, the right comes from tort law. But my argument here is that tort law itself comes from a moral order based on equal accountability. It is this moral accountability that ultimately gives the plaintiff the authority to demand that the doctor and the drug company answer for their decisions and conduct.229

2. A Moral Community of Equals Who Are Mutually Accountable.— My argument is that these structural features—vesting the decision whether to prosecute with the plaintiff alone, leaving the plaintiff in charge of the lawsuit, and directing the lawsuit against the particular wrongdoer—help illuminate the precise role that tort law plays in our normative order.230 Our particular mechanism for accountability upholds our particular Darwalian normative order. Our obligations are not to our clan or to the state. Both the “sources of normativity,”231 and the objects of normativity, as it were, are our fellow citizens.

Tort law, and the accountability it enforces, affirms that our activities and our life plans are ours,232 and that we must answer for the harm that comes from them if we take insufficient care. I am not claiming here that tort law reinforces our normative order by establishing or reaffirming social norms, such as to be careful when driving or not to defame others, though

220–21 (1999) (“[W]ith such careful regulatory oversight, we need not have tort law (and inexpert juries) second-guessing FDA expert determinations.”).

228 The Wall Street Journal editorial page recently made this same point in reference to plaintiffs’ lawyers in an editorial criticizing Congress’s attempts to overrule the recent Riegel preemption decision. See Editorial, Devices for Lawyers, WALL ST. J., Aug. 13, 2008, at A16 (“If Democrats want tort lawyers and juries of laymen to be the ultimate arbiters of new devices, then they should do away with the FDA entirely . . . .”).

229 It is possible, of course, that the precise legal mechanism by which the plaintiff calls he who has harmed her to account might undermine the plaintiff’s authority and, relatedly, the legitimacy of the system of accountability. Indeed, I am concerned about this problem in the context of the jury’s authority to decide the question of “breach,” and the relatively flexible and ill-defined reasonableness standard at the heart of most tort claims, including product liability claims. I intend to explore this concern, and possible reforms to address it, in a separate paper.

230 See Zipursky, Civil Recourse, supra note 44, at 733 (“A central . . . phenomenon of tort law is that a plaintiff sues a defendant.”).


232 See Ripstein, As If It Had Never Happened, supra note 39, at 1985 (noting that “your entitlement to your person and property does not depend on the particular purposes you pursue with it”).
tort law may serve that function as well. Rather, tort law underscores to whom we owe obligations by providing the obligees the authority to call us to account. This is a purpose worthy of the coercive power of the state, and therefore a plausible justification for tort law.

But is this all too fuzzy? One might argue that the aspiration to uphold the “normative order” can’t really support the creation of a whole state system unless there are actually cycles of violence we need to prevent. But I am not arguing that tort law serves to reduce violence that might otherwise erupt, or that tort plaintiffs actually get psychological satisfaction from winning a lawsuit or extracting a settlement.

I am arguing instead that the “role of the liberal state” is in part to reinforce social equality and to make it possible for each to pursue her own ends. In setting up a vehicle for individuals to bring to account others who have harmed them and address their injurers from the “second-person standpoint,” the state reinforces the moral order by treating its citizens as autonomous individuals worthy of dignity and respect. By allowing them to bring tort lawsuits, the state underscores Darwall’s notion of second-person authority, the authority to make a legitimate demand on another, to hold them to expectations. And this conferring of authority on victims by the state is what makes recourse theory distinctive and, perhaps, politically justified.

In affirming individuals’ rights to choose and pursue their own ends, tort law also affirms our necessary interdependence. This whole scheme of liberal individualism and limited government, we might say, will only work if we each moderate our life–liberty–happiness pursuit with sufficient regard for others. And where we fall short, we must settle accounts with one another before going forward. That is, our system of tort law attempts to translate the idea of morality as mutual accountability into concrete terms.

We can think of accountability in two general ways: as a continuous social understanding or as an end-state. As an end-state, we can think of

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233 See Goldberg, Constitutional Status of Tort Law, supra note 44, at 608 (arguing that tort law “build[s] on, amplif[ies], and revise[s] obligations that are already recognized, in part because of habits that both shape and are shaped by law”).

234 See Ripstein, Tort Law in a Liberal State, supra note 37, at 8–12 (using Rawls’s “division of responsibility” between society and the individual to argue that the state’s role is to “enable people to take up their own responsibility for their own lives”).

235 See generally DARWALL, THE SECOND-PERSON STANDPOINT, supra note 127.

236 Goldberg offers a version of this idea in Goldberg, Constitutional Status of Tort Law, supra note 44, at 608–10 (explaining how, “[a]s a body of law that carves out these loci of responsibility, tort helps to maintain a version of civil society that is distinctively liberal”).

237 See Ripstein, Tort Law in a Liberal State, supra note 37, at 18 (“[A] regime of equal freedom requires everyone to limit their activity in the same ways so as to protect the liberty of others by protecting their ability to use their means to set and pursue their own purposes.”).
accountability as the state of being when all accounts are settled. Merck has been held accountable for its actions by Carol Ernst, for example. The scales of justice are even. We can exhale. We have . . . Accountability. This is consistent with corrective justice ideas, but this is not the version of accountability that I think underwrites tort law.

Rather, it is accountability as a constant social understanding that tort law serves to reinforce. By a constant social understanding, I mean that we understand—as we go about our lives, make our choices and plan our activities—that we are answerable to one another. We understand if the pursuit of our own ends is not conducted with due care for others, we may be held to account by those we harm. By harming others, we incur a moral or social debt that may be translated into a financial one. And those we harm may call us into the legal system to settle our accounts.

We also understand that in a society of strangers, we can drive to work, go to the doctor, go shopping at the supermarket—and even though we don't know our fellow drivers, the supermarket proprietor, or even our doctor very well, if at all—we know that there is a system of law available to us if necessary to hold one of these others accountable if they harm us. We similarly know that they are aware that we have this right, and this gives us confidence to conduct our affairs.

We don't need to wait until a lawsuit is filed before settling our accounts, of course. That is why some hospitals have made apologies to victims of medical malpractice in order to try to settle accounts in a proactive way, and have met with some success in doing so. If we know a lawsuit is likely to expose our wrongful behavior, we can compensate the victim.

238 See Miller, supra note 175, at 15 (“Peace is about settling accounts, paying back what you owe.”).

239 See id. at 4–5 (discussing balancing the scales of justice, with the “core justice question” answered by evenness of the scales).

240 See id. at 40 (discussing tort law as a system “in which one is made ‘whole’ with money” for nonmonetary losses, such as the loss of a limb).

241 So far, I have offered the idea of equal accountability as the normative grounding for our system of tort law, but it may also be that a related justification is at work here as well: this backstop of a state-sponsored system of mutual accountability gives us the confidence we need to conduct our affairs in a society of strangers and to enter into various kinds of relationships with others in order to accomplish our ends. A full exploration of this idea is beyond the scope of this paper, but rather than argue for the normative appeal of a state that provides a substitute for vengeance, we might instead profitably think about the normative unattractiveness of a liberal state without it.

242 See Marlynn Wei, Doctors, Apologies, and the Law: An Analysis and Critique of Apology Laws, 40 J. Health L. 107, 108 (2007) (noting that supporters of “apology laws” claim that they will encourage doctors to disclose errors and subsequently reduce the number of medical malpractice lawsuits). See generally Aaron Lazare, The Healing Forces of Apology in Medical Practice and Beyond, 57 DePaul L. REV. 251 (2008) (discussing the potential positive consequences of medical professionals apologizing to victims of malpractice, while noting some risks of such apologies).
prior to any legal action, just as the routinized system of auto insurance now
does for small or modest claims of injury to person or property.\textsuperscript{243}

We can think of this version of accountability from the perspective of potential plaintiffs, potential defendants, and the state. From the defendant’s perspective, Zipursky captures the idea when he says that tort liability is “a form of vulnerability to the one who has been wronged.”\textsuperscript{244} From the state’s perspective, by establishing a system whereby individuals can hold those who have wronged them legally accountable, the state underscores the moral accountability we have toward one another as well. The state does this simply by establishing the system and making it available.\textsuperscript{245}

It is not necessary for wrongdoers to actually be held accountable to achieve the normative force of the state’s action.\textsuperscript{246}

Carol Ernst\textsuperscript{247} might have been advised by her attorney that she had a strong case, but ultimately have decided that she did not want to go through the hassle of litigation. Instead, she might have decided to “move on.” Her actual decision is of no moment to an accountability-centered justification for tort law like the one I offer here. She knew that she was not just a modestly paid nurse, or her husband an underpaid Wal-Mart worker,\textsuperscript{248} neither of whom mattered in a society enamored with wealth. She could call the big multinational company to account, and by knowing that she had such a right, she affirmed her moral and social worth. By providing her with this right, the state affirmed her moral and social worth as well.\textsuperscript{249}

One might say, then, that tort law supports a particular moral order of equal accountability. The state translates this vision of morality—which I am taking primarily from the work of Stephen Darwall\textsuperscript{250} but is certainly

\textsuperscript{243} See Steven Sugarman, A Century of Change in Personal Injury Law, 88 CAL. L. REV. 2403, 2415 (2000) (describing one change, namely that “small claims are paid off at excessive levels by insurers who are eager to clear their dockets and afraid to take a chance that juries might award victims extravagantly high sums”).

\textsuperscript{244} See Zipursky, Two Dimensions of Responsibility, supra note 98, at 110.

\textsuperscript{245} See Zipursky, Civil Recourse, supra note 44, at 739 (“The role of the state in a tort action is not to enforce a duty of the defendant’s, but to empower a plaintiff with a claim.”).

\textsuperscript{246} Though if the system was flawed such that wrongdoers were not held accountable when they should be for arbitrary or other reasons, this would undermine the normative force of having a system of tort law.

\textsuperscript{247} See supra note 1 and accompanying text.

\textsuperscript{248} See Richard Stewart, Even Jurors Shed Tears During Widow’s Vioxx Testimony/Blaming Drug, Carol Ernst Tells About the Night Her Husband Died, HOUS. CHRON., Aug. 5, 2005, at B3, available at 2005 WLNR 24620166 (noting that on the day Carol Ernst’s husband died, he had worked at the local Wal-Mart).

\textsuperscript{249} Cf. Bilz, supra note 172, at 1086–91 (explaining why delegating the task of revenge to the state might be preferable because it would help increase the victim’s social standing).

\textsuperscript{250} See generally DARWALL, THE SECOND-PERSON STANDPOINT, supra note 127.
Based on the work of philosophers such as Aristotle,\textsuperscript{251} Kant,\textsuperscript{252} and others—into concrete terms for day-to-day interactions in modern society.

Bringing a lawsuit against another in response to insufficient regard for care is a critical way of underscoring the authority that people have in the kind of moral community outlined by Darwall. By forcing others to answer when they have caused harm, we affirm that the ability to demand that others take due care is there in the first place. This helps make intelligible how and why the “right to recourse” could be the “animating idea” of tort law.\textsuperscript{253}

It is commonly said—quite correctly—that when an individual brings a tort suit against another, she is attempting to hold that person responsible for her harm. But when an injured person brings a tort lawsuit, she is also in part seeking to hold the state responsible. Here, I mean “responsible” in the sense that she is requesting that the state fulfill its role.\textsuperscript{254} The state has undertaken the responsibility, in the liberal conception, to provide a framework under which autonomous individuals can choose what ends to pursue against their injurers and carry out these actions against them. As Ripstein has explained, the state’s role in this scheme, in the context of private law, is to enforce the boundaries of this framework, and a tort claim is in some sense calling on the state to fulfill this role.\textsuperscript{255} Indeed, it may be that the liberal state would have less legitimacy if it did not provide such a system.\textsuperscript{256}

\textsuperscript{251} See generally ARISTOTLE, NICOMACHEAN ETHICS, BOOK 5.5, 74–76 (T. Irwin trans., 1999); see also WEINRIB, supra note 29, at 56–83 (discussing Aristotle’s early account of corrective justice).

\textsuperscript{252} See generally IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., Cambridge Univ. Press 1991); see also WEINRIB, supra note 29, at 85–113 (discussing Kant’s philosophy of right).

\textsuperscript{253} I am not arguing that this is the only way to achieve this goal of second-person moral address, see generally DARWALL, THE SECOND-PERSON STANDPOINT, supra note 127, nor do I need to. My project is interpretive; I am loosely trying to make sense of our social practices in the context of tort law.

\textsuperscript{254} See Ripstein, Tort Law in a Liberal State, supra note 37, at 8 (discussing the state’s role “in enabling people to set and pursue their own purposes”). Ripstein’s account uses John Rawls’s description of the “division of responsibility” between the state and individuals as its starting point. Under Rawls’s conception, it is up to individuals to choose their own ends, and it is up to the state to provide a framework within which individuals can plan their lives and pursue these ends. See Ripstein, The Division of Responsibility, supra note 114, at 1812.

\textsuperscript{255} See Ripstein, Tort Law in a Liberal State, supra note 37, at 8, 9. See also Goldberg, Constitutional Status of Tort Law, supra note 44, at 527 (“It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs . . . .” (quoting Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 521 (1885))); Zipursky, Civil Recourse, supra note 44, at 699 (“The state provides the plaintiff with a right of action . . . . [The state is thereby] permitting and empowering plaintiffs to act against those who have wronged them . . . .”). Besides Ripstein and the recourse theorists, other scholars who make similar points include Joseph W. Little, Up With Torts, 24 SAN DIEGO L. REV. 861, 876 (1987) (“The law of torts is a big brick in our foundation of democratic governance based upon tenets of minimal government, individual responsibility and personal accountability.”).

\textsuperscript{256} See Kimberly Kessler Ferzan, Self-Defense and the State, 5 OHIO ST. J. CRIM. L. 449, 471 (2008) (arguing that when the state “fails to live up to its obligation” to protect people by offering a mechanism of self-defense, for example, the state opens itself to criticism of its legitimacy).
Here, I consider a number of likely objections to equal accountability as a moral norm supporting tort law generally and recourse theory specifically. Specifically, these objections are: (1) this is really just a disguised defense of legalized vengeance; (2) unlike corrective justice theory, it fails to explain the payment of money damages—indeed, the theory might well point towards an apology as a better remedy; (3) contemporary tort law and practice does not fit this conception doctrinally or functionally; and (4) this is all acceptable in theory, but in practice, tort cases are defended by liability insurers and overwhelmingly settled out of court, undercutting any claim that this system of law helps instantiate accountability among equals. I consider and respond to each of these objections in turn, before concluding with some general implications of this discussion for individual-justice theories.

A. A Defense of Vengeance?

Some might suggest that a theory that supports “acting against” a wrongdoer is really just a thinly disguised argument for vengeance. Indeed, this objection is the heart of Finnis’s and others’ responses to recourse theory. We generally think of revenge as something that is not a “publicly admissible motive for individual action,” but rather something which “must be suppressed and overcome.” Here, I try to unpack a bit more precisely what the charge is and how it ought to be answered.

Finnis says that civil recourse theory necessarily backs the “urge to retaliate.” Is this true? The word “retaliate” comes from the Latin root “ta-lio,” sharing a common origin with the talionic principle at the center of “an eye for an eye” justice in the Hebrew Bible. Merriam-Webster’s dictionary defines retaliate as “to repay (as an injury) in kind” or “to return like for like.” Certainly civil recourse theory backs one who has been wronged acting against the wrongdoer, but not necessarily in the way that the words “retaliate,” “revenge,” or “vengeance” suggest.

“Vengeance” and “revenge” are frequently treated as synonymous terms. Jon Elster defines revenge as “the attempt, at some cost or risk to oneself, to impose suffering upon those who have made one suffer, because they have made one suffer.” Nozick, in distinguishing retribution from revenge, describes revenge as personal. Many scholars have seen revenge as fundamentally about preserving or maintaining honor.

258 Id. at 74. This resistance to revenge or vengeance stems in significant part from Judeo-Christian values. “Vengeance is mine; I will repay, saith the Lord.” Romans 12:19 (King James).
259 Finnis, supra note 75, at 56.
260 Jon Elster, Norms of Revenge, 100 ETHICS 862, 862 (1990).
261 See, e.g., FRENCH, supra note 143; MILLER, supra note 175.
Some have argued, though, that revenge arises more from feelings of resentment, which can stem from minor harms or envy, whereas vengeance is a reaction to an offense and driven by moral indignation, and is therefore more likely to be justified, assuming the act is a proportional response. If there is such a distinction, then, it might be that the satisfaction from vengeance can arise not from making another suffer in kind, but from achieving justice.

Both revenge and vengeance seem to be defined by the motive for the act. As Suzanne Uniacke points out, we might judge the very same act to be an appropriate act of self-defense in one instance, or a morally inappropriate act of revenge in another, simply because the motive for the act was different—self-protection versus the desire to inflict like injury on another.

So are people seeking revenge or vengeance when they act against perceived wrongdoers in some fashion, or more specifically, when they act against wrongdoers by filing a lawsuit against them? Are they seeking to inflict a like injury on one who has wronged them?

I think generally they are not. There are at least two critical aspects of vengeance or revenge that are lacking in the decision to act against a wrongdoer generally, and to file suit for a tort claim specifically. First, there is little if any evidence that the motive of most tort plaintiffs is to make the defendant “suffer” at all, and they certainly do not wish for the defendant to suffer in the way that they have. When someone rear-ends you, most people might yell at the other person: “What the heck were you thinking?” You would probably follow the socially constructed norm of asking for the other person’s insurance information—and of course such an exchange takes place in the shadow of tort law—but you would not take a baseball bat to his fender.

Second, and relatedly, to the extent the victim is inflicting anything on the defendant, the “injury” is of quite a different character. Generally, the victim has suffered a loss of security or bodily integrity, and by bringing a lawsuit, the victim infringes on the defendant’s liberty, both in forcing the defendant to handle the lawsuit in some fashion, and in the possibility that

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263 Id. at 65.
264 Id. at 61 (“We are asking how and why the wrongfulness of an act stems from its having a particular motive, namely the desire for revenge.”).
265 Id.
266 Even in the case of families who filed medical malpractice claims based on perinatal injuries to their infants—a tort setting where one might imagine that anger would play a large role—fewer than one in five cited the desire to “seek revenge or protect others from harm” as a motivation for filing suit. See Gerald B. Hickson et al., Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries, 267 JAMA 1359, 1359, 1361 (1992).
267 But see THE BIG LEBOWSKI (Polygram Filmed Entertainment & Working Title Films 1998) (“I’ll kill your car!”).
the defendant or his insurer will have to pay compensation. In this way, the filing of the lawsuit is better seen as a demand for some kind of answer and measure of justice, rather than the infliction of a like injury.

Understanding precisely how the urge to retaliate or seek revenge relates to tort law and civil recourse theory is important not only to examining whether “acting against” the injurer is morally justified, but also to whether the state ought to support and contribute resources towards such actions. Asking why the state should support the urge to retaliate, as Finnis does, might lead to quite a different answer than asking whether the state ought to support the instinct to hold another accountable.

**B. Why Not Just Demand Apology or Confront?**

Mrs. Ernst, of course, was doing more than standing up for herself and her husband and making a statement to Merck. The trial provided her with an opportunity to confront the party that had wronged her. But Mrs. Ernst’s “complaint” was more than just a complaint; it was a request for money, and a lot of it. This, of course, is true of the overwhelming majority of tort lawsuits. But why should the victim be permitted to request money? If tort law is truly about accountability—the moral authority of a plaintiff to demand answers from a defendant—why not change the focus of tort law to achieve just that? Tort law could simply provide a forum where victims can demand answers and perhaps ask for an apology. Indeed, there is increasing evidence in a variety of areas, particularly in medical malpractice in the United States, that apologies are effective ways of forestalling lawsuits.268

Certainly, for some victims, an apology may be enough. But to the extent that it is, this says nothing about the importance of an institution that allows victims to hold those who have wronged them accountable. If the victim thinks that an apology is enough for the wrongdoer to pay off his debt, then that is fine. But in many cases, the victim may understandably feel that “I’m sorry” is insufficient given the wrong.269

Moreover, as William Ian Miller has demonstrated with reference to historical practices and different cultures, compensation in response to a wrong has always been an accepted option for settling accounts, and a via-

268 See Jennifer K. Robbennolt, *What We Know and Don’t Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1015–24 (reviewing the survey, experimental, and case-study evidence, but cautioning that considerably more empirical research remains to be done); Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55, 85–87 (2005) (reviewing the evidence, consisting largely of case studies); see also Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 148–49 (1994) (finding that, in an experimental settlement negotiation based on a landlord–tenant dispute, tenants were more willing to accept the settlement offer when offered an apology, perhaps because it “provided enough vindication of the tenant’s moral position and sense of equity”).

269 See Goldberg, *Constitutional Status of Tort Law*, supra note 44, at 602–03 (suggesting that an apology would not provide “satisfaction” to those who suffered significant harm).
able alternative to actually taking “an eye” or a life. Indeed, Miller’s work is in part a reaction to the legal scholars who argue that the purpose of tort law is compensation, often through reimbursement for medical bills or wage loss, and that this is somehow very different from vengeance. He says:

The once dominant view of legal historians—a view that arose in the nineteenth century and that is untenable in the face of the evidence, although one still hears it recited as gospel in law schools—is that revenge systems gave way to compensation systems, which then paved the way for state-delivered justice, amidst general rejoicing at the progress. The fact is that revenge in blood invariably coexisted with means of paying off the avenger by transfers of property or money-like substances in lieu of blood. Revenge always coexisted with a compensation option. The conceptual underpinning was exactly the same in either case: both revenge and compensation were articulated solely in idioms of repayment of debts and of settling scores and accounts. Revenge was compensation using blood, not instead of money, but as a kind of money.²⁷⁰

Carol Ernst’s husband was fifty-nine years old and worked for $21,700 a year at Wal-Mart—assume, as the jury found, that Merck deceived the Ernsts about the safety of Vioxx in order to make a profit, and that its deception caused the death of Bob Ernst. Does six years of that Wal-Mart salary really constitute a proper accounting of the value of the wrong done to Mrs. Ernst? It seems clear that the answer to this question is no, and yet the attack on noneconomic and punitive damages from the tort reform movement, which has been quite successful, implies precisely the opposite.

The preemption efforts imply that providing victims with the ability to settle accounts—establishing answerability—is unnecessary. If regulation needs to be done, this regulation should be done by the FDA, not state tort law. If medical bills need to be paid, health insurance should be responsible. Life insurance, social security, and sometimes workers’ compensation should provide any additional financial support needed for widows and other loved ones. These efforts seem to indicate that allowing for compensation as a measure of justice is not a proper activity for law. I disagree.

C. General Lack of Fit with Contemporary Tort Law and Practice

Another set of objections claims that this conception of tort law, even if normatively appealing, does not and cannot fit with contemporary tort law and practice. These objections come from a few different directions.

First, doctrinally, that by only recognizing certain kinds of injuries as cognizable wrongs, tort is radically underinclusive if designed to address instances where one wrongs another.²⁷¹ Second, functionally, that modern-

²⁷⁰ MILLER, supra note 175, at 25 (footnotes omitted).
²⁷¹ In other ways, one could say that tort as civil recourse is overinclusive, for example, by allowing punitive damages that far exceed the measure of the harm done by a defendant to a particular plaintiff, and by allowing vicarious liability in instances where the defendant employer had used due care but is
day tort is the equivalent of a social insurance scheme, and this civil recourse conception relies on an atavistic notion of social interaction that fits better with medieval honor societies.272 In the next section, I also consider a related objection: that the prevalence of settlement and insurance in the tort system precludes a meaningful system of private wrongs.

The doctrinal objection is that if tort law is really given normative intelligibility by the kind of Darwallian moral theory I deploy above in Part II, then it seems to suffer, first, from a serious problem of underinclusivity—specifically, that only wrongs that happen to result in injury count as torts.273 Take as an example a dinner party where I describe an acquaintance of those gathered as “a real jerk.” My motivation for saying this—let's hypothesize—is that the acquaintance has gotten a job I wanted, and I'm jealous. By any moral code, I have acted wrongfully, and have wronged this person. And under Darwall's second-person standpoint, critical to understanding the importance of civil recourse theory, it is important in our moral and social practices for this person to be able to confront me and hold me accountable.

And yet tort law does not allow this person to do that. The likely claim of defamation would fail on one of several grounds, including that the statement is not actionable because it is an opinion not based on discernable fact; the plaintiff cannot demonstrate that the statement is false; and perhaps the plaintiff is unable to show real harm to his standing in the community.274 No self-respecting lawyer would take this case.

So can tort law really be about the right to confront one who has wronged you? I think it can. Just because tort law does not recognize all wrongs, that does not mean that it cannot be about wrongs at all. Even if tort serves to instantiate a set of moral obligations, it must nonetheless function as a legal system.275 The injury requirement can be seen as rendering

nonetheless held responsible for the actions of an employee. I think this argument has some force, and will explore it further in future work.

272 Though others have made this point in different ways, I owe this particular formulation to Ed Rubin. Cf. Edward L. Rubin, Beyond Camelot 153–54 (2005) (describing the commitment to promise-keeping contained in social contract theory as a remnant of medieval honor societies, and out of place in our “contemporary social ethos”).

273 See Goldberg & Zipursky, Internal Point of View, supra note 44, at 1586 (describing the critique as saying that “legal ‘duties’ that provide the basis for liability in tort seem to be both seriously underinclusive and seriously overinclusive relative to standard notions of morality and moral duties”). A related version of this claim is made by the critics of corrective justice on “moral luck” grounds, frequently when discussing the causation requirement. See, e.g., Larry A. Alexander, Causation and Corrective Justice: Does Tort Law Make Sense?, 6 L. & Phil. 1, 12–17 (1987) (describing the causation requirement as a “fatal condition” at the core of corrective justice). But see Goldberg & Zipursky, Moral Luck, supra note 44, at 1132–40 (rebuiting the “causal luck” critique).


275 See Goldberg & Zipursky, Internal Point of View, supra note 44, at 1586 (“[B]ecause law comes with consequences that morality does not (most obviously state-enforced sanctions), and because there
this legal system of private wrongs manageable either at a macro level (without it, the system would be swamped with claims), or at a micro level in that individual claims would not be adjudicable without an injury to serve as evidence of the causal link of the wrong to the harm.\textsuperscript{276}

The functional objection is that tort law is serving more as a social insurance scheme than as a vehicle for individual justice.\textsuperscript{277} The evidence for this is in part based on the fact that the bulk of tort claims are overwhelmingly accidental physical injuries.\textsuperscript{278} Addressing this objection fully is beyond this scope of the Article, but for now, this claim ignores a few other significant data points.\textsuperscript{279} First, though accidental physical injuries are indeed most of the claims that are filed, other claims such as defamation, assault, nuisance, and fraud are quite important in the overall culture of and popular discourse about tort law specifically and lawsuits more generally.\textsuperscript{280} Second, to the extent that this objection is a claim about the motivation of tort plaintiffs, it is at odds with evidence drawn from the medical malpractice context indicating that higher-income individuals are more likely to file claims than lower-income individuals.\textsuperscript{281} Finally, the contemporary American tort system bears a close family resemblance to the English tort system.
on which it is based, but England has a significantly more extensive social insurance system than the United States, including universal health insurance.

D. Settlement & Insurance

Another objection relates to the widespread practice of individuals and entities holding liability insurance, and the overwhelming majority of cases settling before trial. Together, these practices present a challenge to my suggested justification for recourse theory along the following lines: “Even if in theory the law of torts might help achieve or instantiate mutual accountability among equals,” the objection goes, “the way tort law actually works means that no such accountability is actually achieved.”

Because most individuals and entities hold liability insurance, in most torts cases the defendants are not actually the alleged wrongdoers. Rather, they are the wrongdoers’ insurance company. Take the three most common kinds of tort cases in the United States today: auto accidents, premises liability, and medical malpractice. In each of these categories, almost every person or entity sued is going to have a liability insurance provider that will take over the defense of the case and pay the cost of any settlement or judgment. Therefore, the plaintiff is not “acting against” the wrongdoer in any real sense; rather, she is “seeking payment from” an insurance company. The insurance company might hold the insured “accountable” by raising premiums if it has to pay too much, but this is not the same as the plaintiff holding the wrongdoer accountable.

This is a familiar objection raised against various theories of tort law, not just those that focus on individual justice, and it deserves to be taken seriously. Nonetheless, I think it is by no means fatal to this kind of theory. The purpose of this kind of interpretive theory of tort law is to understand how the institution of law is functioning. If the parties acting within that system make arrangements such as purchasing insurance ex ante to deal with the prospect of being held accountable, that does not fundamentally change the nature of the social institution itself. Moreover, the fact that the wrongdoer is often not the defendant gives greater force to the argument that the salient feature of the institution of tort is what it does for victims—

284 Liability insurance might even further advance some of the objectives of tort law. See Goldberg, Ten Half-Truths About Tort Law, supra note 279, at 1268–69 (suggesting that widespread liability insurance has made the opportunity for redress more available, thereby contributing to the “democratization of tort law”); Gary Schwartz, The Economics and Ethics of Liability Insurance, 75 CORNELL L. REV. 313, 365 (1990) (arguing in part that liability insurance may advance fairness goals associated with tort law).
empowering them to demand answers and justice—not to wrongdoers, whether through pricing risky activity or defining obligations.285

The second objection stems from the fact that a majority of these tort claims are settled before trial. Thus, some might argue that my example of Carol Ernst confronting Merck and its executives in a Texas courtroom could not be more inapposite to the reality of our civil justice system, where few cases ever make it to trial. But the response to this argument is similar to the response to the insurance objection: what tort law does provide victims like Mrs. Ernst is the power to hold wrongdoers to account—if the wrongdoers decide to settle accounts before a public trial, this is quite tangible evidence that the right to recourse is real and not just symbolic. In paying a settlement, the defendant has indeed been held to account.

Finally, it is not at all clear that the “law in action” research on our tort system cuts against, rather than supports, a system of mutual accountability. For example, Tom Baker, a leading “law in action” torts scholar, has studied the practices of liability insurers defending tort cases and found that the role of “blood money”—money over and above the insurance policy limit that would therefore come out of the individual or entity’s pocket—does play a major role in settlement negotiations in certain kinds of cases.286 This might indicate that where the harm is particularly severe, or the conduct at issue particularly wrongful, insurers are forced to settle accounts to prevent “blood money” from entering the picture.

CONCLUSION

This Article started with the hope that understanding the normative appeal of a law of civil recourse might help illuminate what is at stake in debates over preemption and tort reform. Here, I simply offer a few observations on these issues, and then some additional thoughts on the theoretical implications of the idea of equal accountability as the heart of tort law.

For preemption, the logic of the “implied preemption” doctrine assumes that tort law is a state regulatory regime intended to complement the federal regulatory regime governed, for example, by the Food and Drug Act.287 If one is persuaded that tort as civil recourse can be defended normatively, then one might be more willing to believe that tort is really (or primarily, or also) about individual justice. If that is the case, then that considerably weakens the argument for implied preemption based on the idea that the federal government is already occupying the regulatory space that

285 Thanks to Gautam Huded for this point.
287 See supra text accompanying notes 7–16.
the states seek. Though I do not offer the argument in this paper as a theory of adjudication particularly, this is one area where it might play such a role.

In the context of tort reform, I think the implications are even stronger.\textsuperscript{288} When a state legislature is considering a cap on or even the elimination of noneconomic damages, for example, the idea of tort as a vehicle for justice for people who have been wronged cuts against such a move. A severe limit on noneconomic damages might mean that certain plaintiffs, particularly children and the elderly, are not awarded the proper measure of compensation for the wrong done to them.\textsuperscript{289} Such a cap might be of less concern, though, if the purpose of tort law was to insure against the risk of lost wages and medical bills due to physical injuries.\textsuperscript{290} Cutting in the other direction might be proposals to eliminate or limit joint and several liability.\textsuperscript{291} If the purpose of tort law is for individuals to be able to hold accountable those who have wronged them, then allowing plaintiffs to recover from defendants more than their proportionate share of responsibility might be undesirable. Whereas if tort law was more a form of localized distributive justice, then asking a culpable defendant to pick up the share of an insolvent fellow wrongdoer might well make sense.

I have introduced and defended this notion of equal accountability as the conceptual underpinning of a particular theory of individual justice, civil recourse theory, but I think it holds great promise for explaining and justifying tort law more broadly. Before concluding, I will propose that Darwall’s notion of equal accountability can help corrective justice theory as well. A full exploration of this possibility is beyond the scope of this Article, but I offer some preliminary suggestions here.

It may be that this notion of accountability—providing civil recourse ex post to ensure respect and equality ex ante—offers a way of underscoring and reinforcing Kantian equality without restoring a balance that may itself have been distributively unjust.\textsuperscript{292} In this way, accountability might

\textsuperscript{288} In this way, the argument in the paper might be as useful or more so to legislators than judges.

\textsuperscript{289} For related ideas, see Goldberg, \textit{Ten Half-Truths About Tort Law}, supra note 279, at 1255–58 (arguing that the “make whole” formulation for damages is inaccurate historically and misleading conceptually); John C.P. Goldberg, \textit{Two Conceptions of Tort Damages: Fair v. Full Compensation}, 55 DePaul L. Rev. 435, 438–47 (2006) (discussing the idea of “fair compensation” in Blackstone’s Commentaries and other treatises).

\textsuperscript{290} California Supreme Court Justice Roger Traynor put the point nicely in a dissent in a case involving damages for pain and suffering: “Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. . . . They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation.” Seffert v. L.A. Transit Lines, 364 P.2d 337, 345 (Cal. 1961) (citations omitted) (quoted in Peter W. Huber, Liability 132 (1988)).

\textsuperscript{291} See Hubbard, supra note 18, at 488–92 (describing such changes).

\textsuperscript{292} A related account is offered by Martin Stone, who provides an alternative reading of Aristotle’s use of the word “equality” in his discussion of corrective justice. See Martin Stone, \textit{The Significance of Doing and Suffering, in Philosophy and the Law of Torts} 156–59 (Gerald Postema ed. 2001) (ex-
provide a “point or purpose” to corrective justice that relates to a kind of distributive justice in a way that parallels Jules Coleman’s mapping of the relationship. Under this view, we have a society with an equal distribution of Kantian right—the right to pursue one’s own ends and demand that others not treat you as a means to their own ends. Corrective justice serves to preserve this distributively just allocation by allowing individuals to hold others to account; with corrective justice, we have a means of “restoring the moral order.”

This sort of understanding might also provide a bridge between the notions of normative loss and factual loss that has divided corrective justice theorists. When one wrongfully harms another, he is subject to confrontation by the victim and a demand to settle accounts. The wrongdoer must pay the debt—but it is not a debt that precisely corresponds to what the plaintiff lost. If one person accidentally and wrongfully breaks another’s leg, he doesn’t just give him money for a prosthetic or his medical treatment because someone has to pay for the mess. When we look around to make the distributive choice of who should be held financially responsible, we conclude as a matter of fairness that one or more injurers have behaved in such a way that they ought to compensate the victim. The injurer might be liable for an amount that is arrived at through estimates of medical expenses, wage loss, pain and suffering, and even “special” damages to account for particularly severe wrongs. In this way, the normative loss is measured in part by the factual loss—the two are linked, but the normative loss is analytically prior or paramount.

Equal accountability might just be the morally appealing norm that can underwrite both major contenders of individual justice theory. Indeed, it might help bridge the methodological divide. The social practice or understanding of accountability—the ability to hold others accountable for wrongs done to them (call it civil recourse)—is an important feature of our normative order. Understanding the role of accountability helps make sense

plaining that this reading might interpret conduct as wrongful, and a departure from equality, because it is “inconsistent with the equal status of other affected agents”). Stone also indicates that the idea of responsibility at work in this kind of corrective-justice framework is not just about when someone may be blamed for her actions, but rather has to do with “the answerability of persons, potentially indifferent to one another, living in civic association.” Id. at 159.


294 This view runs counter to that presented in Ripstein, As If It Had Never Happened, supra note 39, at 1972.

295 This view runs counter to that presented in Jules L. Coleman, Second Thoughts and Other First Impressions, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 257, 302 (Brian Bix ed., 1998) (“Tort law is about messes. A mess has been made, and the only question before the court is, who is to clean it up?”). It is this “localized distributive justice” approach that is disapproved of by wrongs-based theorists like Weinrib and the recourse theorists.

296 See, e.g., COLEMAN, supra note 73, at 222 (“When an accident occurs, costs are created. Someone has to bear those costs. No matter how hard we may wish them away, they won’t disappear. The only question is, Who should bear these costs?”).
of the conceptual structure and the features of the legal process itself, while the monetary remedy fits well with a notion of settling accounts, as it has been for centuries as a substitute for literally taking “an eye” for an eye.

Finally, the idea of mutual accountability in a community of equals might just provide us with an answer to the three questions with which we began: What is it we are preempting? What is it we are reforming? And, most importantly, what is tort law for?

It does not necessarily provide an answer for the outcomes of cases or even help us make doctrinal choices. The companion concept of responsibility, focusing more on the defendant, might be more useful in answering these questions. But mutual or equal accountability helps provide the framework within which we can start asking these questions. Moreover, more work needs to be done to assess how such a system of equal accountability might function better.

By viewing tort law as a system that provides for accountability, we can see what Carol Ernst was seeking in that Texas courtroom when she sued Merck on behalf of herself and her husband: not “eye for an eye”-style justice, but “eye to eye” justice. She had the opportunity to look at those Merck representatives and force them to answer to her and treat her with equal respect. My argument here has been that the principal value of tort law might well be in making that possible.